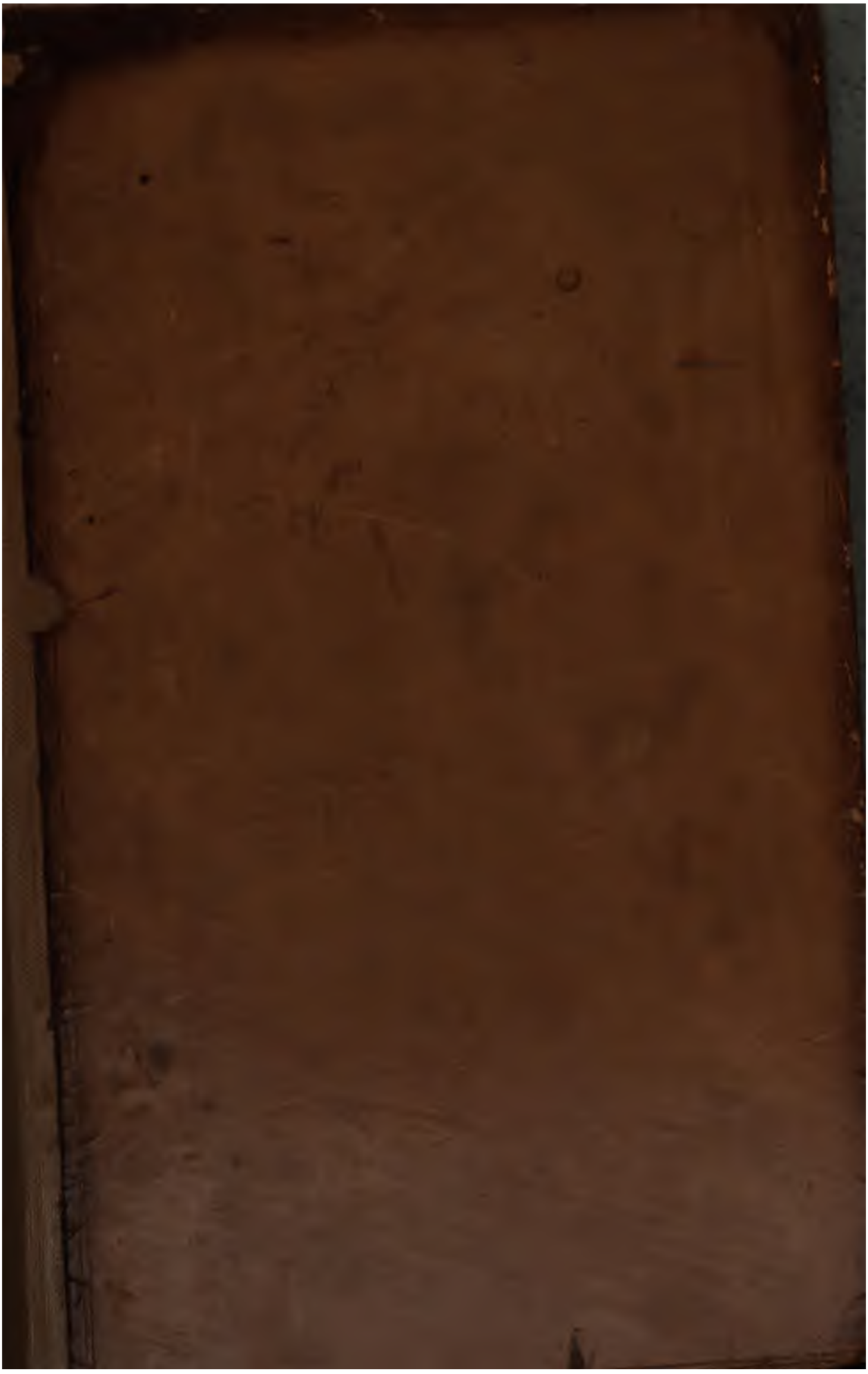

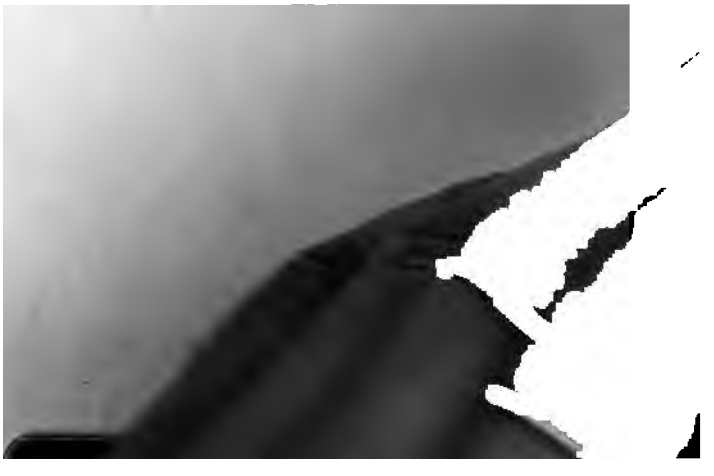

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PRACTICAL TREATISE

OF

THE LAW

OF

VENDORS AND PURCHASERS

OF

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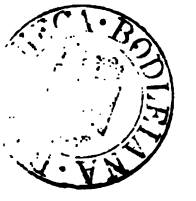

By EDWARD BURTENSHAW SUGDEN, Esq.
ONE OF HIS MAJESTY'S COUNSEL.

BONÆ FIDEI VENDITOREM, NEC COMMODORUM SPEM AUGERE, NEC INCOMMODORUM COGNITIONEM OBSCURARE OPORTET.
Valerius Maximus, l. vii. c. 11.

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TO

CHARLES BUTLER, Esq.

THIS WORK

IS

RESPECTFULLY INSCRIBED

BY

HIS SINCERE FRIEND,

AND VERY OBEDIENT SERVANT,

THE AUTHOR.

ADVERTISEMENT.

THE Author has revised the Treatise and incorporated the late Cases into the present Edition. He has not been personally able to attend to the Work in its progress through the Press, but that task has been kindly performed by a friend upon whose accuracy and ability he can rely.

LINCOLN'S INN,
June 20, 1822.

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ERRATA.

Page 42, line 21, *for* hæriditas, *read* hæreditas.
— 272, last line but 3, *for* a, *read* at.
— 410, in notes, *for* 386, *read* 269.

THE LAW

OF

VENDORS AND PURCHASERS

OF

ESTATES.

INTRODUCTION.

MORAL writers insist (*a*), that a vendor is bound, *in foro conscientiæ*, to acquaint a purchaser with the defects of the subject of the contract. Arguments of some force have, however, been advanced in favour of the contrary doctrine; and our law does not entirely coincide with this strict precept of morality (*b*).

If a person enter into a contract, with full knowledge of all the defects in the estate, the question cannot arise: *scientia enim utrinque par pares facit contrahentes* (*c*).

(*a*) Cic. de Off. 3. 13; Grotius de Jure Belli ac Pacis, l. 2. c. 12. s. 9; Puffendorf de Jure Naturæ et Gentium, l. 5. c. 3. s. 2; Puffendorf de Off. l. 1. c. 15. s. 3; Valerius Maximus, l. 8. c. 11; et vide Deuteron. xxv, 14; Paley's Mor. Philos. vol. 1. b. 3. ch. 7.

(*b*) *Vide infra*, ch. 6.

(*c*) Grotius de Jure Belli ac Pacis, l. 2. c. 12. s. 9. 3; Puffendorf de Jure Naturæ et Gentium, l. 5. c. 3. s. 5.

So if, at the time of the contract, the vendor himself was not aware of any defect in the estate, it seems, that the purchaser must take the estate with all its faults, and cannot claim any compensation for them.

And even if the purchaser was, at the time of the contract, ignorant of the defects, and the vendor was acquainted with them, and did not disclose them to the purchaser; yet, if they were *patent*, and could have been discovered by a vigilant man, no relief will be granted against the vendor.

The disclosure of even *patent* defects in the subject of a contract, may be allowed to be a moral duty; but it is what the civilians term a duty of imperfect obligation. *Vigilantibus, non dormientibus jura subveniunt*, is an ancient maxim of our law, and forms an insurmountable barrier against the claims of an improvident purchaser.

In this respect, equity follows the law. But it has been decided, that if a vendor, during the treaty, industriously prevent the purchaser from seeing a defect which might otherwise have easily been discovered, he is not entitled to the extraordinary aid of a court of equity: and it is conceived, that he could not even sustain an action against the purchaser for a breach of the contract.

And if a vendor know that there is a *latent* defect in his estate, which the purchaser could not, by any attention whatever, possibly discover, it is not clear that he is not bound to disclose his knowledge, although the estate be sold, expressly subject to all its faults (*d*).

By the civil law, vendors were bound, to warrant both the title and estate against all defects, whether they were or were not conusant of them. To prevent, however, the inconveniences which would have inevitably resulted from this general doctrine, it was qualified by holding, that if

(*d*) See *post*, ch. 6. s. 2.

the

the defects of the subject of the contract were evident, or the buyer might have known them by proper precaution, he could not obtain any relief against the vendor.

The rule of the civil law also was, "*simplex commendatio non obligat.*" If the seller merely made use of those expressions, which are usual to sellers, who praise at random the goods which they are desirous to sell; the buyer, who ought not to have relied upon such vague expressions, could not, upon this pretext, procure the sale to be dissolved (*e*).

The same rule prevails in our law (*f*), and has received a very lax construction in favour of vendors. It has been decided, that no relief lies against a vendor for having falsely affirmed, that a person bid a particular sum for the estate, although the vendee was thereby induced to purchase it, and was deceived in the value (*g*).

Neither can a purchaser obtain any relief against a vendor for false affirmation of value (*h*); it being deemed the purchaser's own folly to credit a nude assertion of that nature. Besides, value consists in judgment and estimation, in which many men differ (*i*). So, where a church lease was described in the particulars of sale, as being nearly of equal value with a freehold, and renewable every ten years, upon payment of a *small fine*, the purchaser was not allowed any abatement in his purchase-money, although the fine was very considerable, and it was proved that the steward of the estate had remonstrated with the vendor, before the sale, upon his false

(*e*) 1 Dom. 85.

(*f*) Chandelor *v.* Lopus, Cro. Jac. 4.

(*g*) 1 Rol. Abr. 101. pl. 16. See 1 Sid. 146; Kinnaird *v.* Lord Dean, stated *infra*, n.; Dawes *v.* King, 1 Stark. 75.

(*h*) Harvey *v.* Young, Yelv. 20. See Duckenfield *v.* Whichcott, 2 Cha. Ca. 204.

(*i*) See Ekins *v.* Treaham, 1 Lev. 102; reported 1 Sid. 146, by the name of Leakins *v.* Chissel.

description (*j*). And a statement in the particulars of an advowson, that a voidance of the preferment was likely to occur soon, was held to be so vague and indefinite, that the Court could not take notice of it judicially; and that its only effect ought to have been, to put the purchaser upon making inquiries respecting the circumstances under which the alleged avoidance was likely to take place, previous to his becoming the purchaser (*k*).

But if a vendor affirm, that the estate was valued by persons of judgment, at a greater price than it actually was, and the purchaser act upon such misrepresentation, the vendor cannot compel the execution of the contract in equity (*l*), nor would he, it should seem, be permitted to maintain an action at law for non-performance of the agreement.

And a remedy will lie against a vendor, for falsely affirming that a greater rent is paid for the estate than is actually reserved (*m*) (I); because that is a circumstance

(*j*) Brown *v.* Fenton, Rolls, 23 June, 1807, MS.; S. C. 14 Ves. jun. 144.

(*k*) Trower *v.* Newcome, 3 Mer. 704.

(*l*) Buxton *v.* Cooper, 3 Atk. 383; S. C. MS.

(*m*) Ekins v. Tresham, *ubi sup.*; Lysney *v.* Selby, 2 Lord Raym. 1118; 1 Salk. 211, S. C. nom. Risney v. Selby.

(I) In the 1st vol. of Coll. of Decis. p. 332, the following case is reported:—An heritor having solemnly affirmed to his tacksman at setting the lands, that there was paid, by the preceding tenants, for each acre, a great deal more than really was paid, and thereby induced him to take it at a very exorbitant rate, whereby he was leased *ultra dimidium*; yet continued to possess two years before he complained. The Lords found the allegeance of circumvention and fraud, both in *consilio* and in *eventu*, not sufficient to reduce the tack, *and that the tenant should have informed himself better what was the true rent, and not have relied on the setter's assertion, and ought to have tried the quality of the ground, and, his eye being his merchant, he had none to blame but himself*, especially now that he had acquiesced two years. Kinnaird *v.* Lord Dean.

within

within his own knowledge. The purchaser is not bound to inquire further: for the leases may be made by parol, and the tenants may refuse to inform the purchaser what rent they pay; or the tenants may combine with the landlord, under whose power they frequently are, and so misinform and cheat the purchaser. It has been decided also, after great consideration (*n*), that a purchaser may recover against a vendor for false affirmation of rent, although he did not depend upon the statement, but inquired what the estate let for. However, where it can be satisfactorily proved, that the purchaser did not rely upon the vendor's assertion, a jury would undoubtedly give trifling damages.

It seems that the same remedy will lie against a person *not interested in the property*, for making a false representation to a purchaser of value or rent, as might be resorted to in case such person were owner of the estate (*o*); but the statement must be made *fraudulently*, that is, with an intention to deceive; whether it be to favour the owner, or from an expectation of advantage to the party himself, or from ill-will towards the other, or from mere wantonness, appears to be immaterial (*p*).

And in cases of this nature it will be sufficient proof of fraud to show, first, that the fact, as represented, is false: secondly, that the person making the representation, had a knowledge of a fact contrary to it. The injured party cannot dive into the secret recesses of the other's heart, so as to know whether he did or did not recollect the fact; and therefore, it is no excuse in the party, who made the

(*n*) Lysney *v.* Selby, *ubi sup.*

(*o*) Pasley *v.* Freemen, 3 Term Rep. 51; Eyre *v.* Dunsford, 1 East, 318; Ex parte Carr, 3 Ves. and Bea. 106.

(*p*) Haycraft *v.* Creasy, 2 East, 92; Tapp *v.* Lee, 3 Bos. and Pull. 367; and see 6 Ves. jun. 186; 13 Ves. jun. 134; 12 East, 634, n.; Hutchinson *v.* Bell, 1 Taunt. 558; De Graves *v.* Smith, 2 Camp. Ca. 533.

 representation,

representation, to say, that though he had received information of the fact, he did not, at that time, recollect it (*q*).

A *purchaser* is not liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers (*r*). Nor is a purchaser bound to acquaint the vendor with any *latent* advantage in the estate: for instance, if a purchaser has discovered that there is a mine under the estate, he is not bound to disclose that circumstance to the vendor, although he knows the vendor is ignorant of it (*s*). Equity will not, however, interfere in favour of a purchaser who has misrepresented the estate to any person who had a desire of purchasing it (*t*).

The same rules apply to incumbrances and defects in the title to an estate, as to defects in the estate itself. Both law and equity require the vendor to deliver to the purchaser the instrument by which the incumbrances were created, or on which the defects arise; or to acquaint him with the facts, if they do not appear on the title-deeds. If a vendor neglect this, he is guilty of a direct fraud, which the purchaser, however vigilant, has no means of discovering: and Lord Hardwicke laid it down (*u*), "that even if an attorney of a vendor of an

(*q*) Burrowes *v.* Lock, 10 Ves. jun. 470, per Sir Wm. Grant.

(*r*) See Vernon *v.* Keys, 12 East, 632.

(*s*) See 2 Bro. C. C. 420.

(*t*) See Howard *v.* Hopkyns, 2 Atk. 371; and Young *v.* Clerk, Prec. Cha. 538.

(*u*) *Per* Lord Hardwicke, 1 Ves. 96; and see 6 Ves. jun. 193; Burrowes *v.* Lock, 10 Ves. jun. 470; and Bowles *v.* Stewart, 1 Sch. and Lef. 227.

estate,

estate, knowing of incumbrances thereon, treat for his client in the sale thereof, without disclosing them to the purchaser or contractor, knowing him a stranger thereto, but represents it so as to induce a buyer to trust his money upon it, a remedy lies against him in *equity* (*x*): to which principle it is necessary for the court to adhere, to preserve integrity and fair dealing between man and man; most transactions being by the intervention of an attorney or solicitor."

The same observation applies, and indeed with much greater force, to the attorney or agent of the purchaser. It can, however, seldom happen, that the attorney or agent of the purchaser is conusant of any incumbrance on the estate intended to be purchased, unless he be employed by both parties; which the same person frequently is, in order to save expense. This practice has been discountenanced by the courts (*y*), and is often productive of the most serious consequences; for it not rarely happens, that there are incumbrances on an estate which can only be sustained in equity, and which will not bind a purchaser who obtains the legal estate, unless he had notice of them previously to completing his purchase. Now notice (*z*) to an agent, although one concerned for both parties, is treated in equity as notice to the purchaser himself; and, therefore, if the attorney know of any equitable incumbrance, the purchaser will be bound by it, although he himself was not aware of its existence.

And by these means, a purchaser may even deprive himself of the benefit to be derived from the estate lying in a register county: the register may be searched, and

(*x*) It seems clear that relief might now be obtained at law.

(*y*) See 6 Ves: jun. 631, n.

(*z*) See *infra*, ch. 17.

no incumbrance appear; yet, if the attorney have notice of any unregistered incumbrance, equity will assist the incumbrancer in establishing his demand against the purchaser (*a*).

Another powerful reason why a purchaser should not employ the vendor's attorney is, that if the vendor be guilty of a fraud in the sale of the estate, to which the attorney is privy, the purchaser, although it be proved that he was innocent, will be responsible for the misconduct of his agent (*b*). In one case (*c*) a purchaser lost an estate, for which he gave nearly 8,000*l.* merely by employing the vendor's attorney, who was privy to a fraudulent disposition of the purchase money.

With the exception of a vendor, or his agent, suppressing an incumbrance, or a defect in the title, it seems clear, that a purchaser cannot obtain relief against a vendor for any incumbrance, or defect in the title, to which his covenants do not extend; and therefore if a purchaser neglect to have the title investigated, or his counsel overlook any defect in it, he appears to be without a remedy (*d*).

To sum up the foregoing observations, a purchaser is entitled to relief, on account of any *latent* defects in the estate, or in the title to the estate, which were not disclosed to him, and of which the vendor, or his agent, was aware. In addition to this protection afforded him by the law, a provident purchaser will examine and ascertain the quality and value of the estate, and not trust to the description and representation of the vendor, or his agents; he will employ an agent and attorney not concerned for

(*a*) See *infra*, ch. 16, 17.

(*b*) See Bowles v. Stewart, 1 Sch. and Lef. 227.

(*c*) Doe v. Martin, 4 Term. Rep. 39.

(*d*) See *post*, ch. 9.

the

the vendor, and will have the title to the estate inspected by counsel (I).

Where it is stated upon a sale, even by auction, that the estate is in lease, and there is no *misrepresentation*, the purchaser will not be entitled to any compensation, although there are covenants in the lease contrary to the custom of the country; because, whoever buys with notice of a lease, is held conusant of all its contents (*e*). This rule, it should seem, ought, as between a vendor and purchaser, to have been confined to a contract actually executed by the conveyance of the estate and payment of the purchase-money; but as the point has been thus decided, no person having notice of any lease, or that the estate is in the occupation of tenants, should sign a contract for purchase of the estate without first seeing the leases, unless the vendor will stipulate that they contain such covenants only as are justified by the custom of the country.

With respect to incumbrances, it remains to remark, that if a purchaser suspect any person has a claim on the estate which he has contracted to buy, he should inquire the fact of him, *at the same time stating that he intends to purchase the estate*; and if the person of whom the inquiry is made has an incumbrance on the estate, and deny it, equity would not afterwards permit him to enforce his demand against the purchaser (*f*).

(*e*) Hall *v.* Smith, Rolls, 18 Dec. 1807, MS.; S. C. 14 Ves. jun. 426; Walter *v.* Maunde, 1 Jac. and Walk. 181.

(*f*) Ibbeston v. Rhodes, 2 Vern. 554; Amy's case, 2 Cha. Ca. 128, cited.

(I) This can seldom be effectually done, unless the abstract be carefully compared with the title-deeds: in doing which, the attention should be particularly directed to the descriptions of the parties, the recitals, the parcels, and the covenants for quiet enjoyment, free from incumbrances; which frequently lead to incumbrances and facts which have been suppressed. This should be particularly attended to, as a purchaser is bound by every deed or fact, to which an instrument in his possession leads, by recital or description. See *post*, ch. 16.

The

The inquiry should be made before proper witnesses; and as a witness may refresh his memory by looking at any paper if he can afterwards swear to the facts from his own memory, it seems advisable that the witnesses should take a note of what passes (*g*).

Where difficulties arise in making out a good title, the purchaser should not take possession of the estate, until every obstacle is removed. Purchasers frequently take this step, under an impression, that it gives them an advantage over the vendor; but this is a false notion; such a measure would, in many cases, be deemed an acceptance of the title (*h*), or would at least be a ground to leave it to a jury, to consider whether the party had not taken possession with an intention to wave all objections. Where a purchaser, after delivery to him of the abstract, which disclosed a reservation of a right of sporting not noticed in the particulars by which he purchased, upon his application was let into possession, and paid the greater part of the purchase-money, without objecting to the right reserved, and apologized for not sending the draft of the conveyance, and afterwards raised the objection, he was held bound by his conduct, which was considered as a waver of the objection; and although a clerk of the seller's solicitor wrote in answer to the purchaser's application for compensation, that a reasonable compensation would be allowed, yet this was not deemed binding, as he had no authority to make such an offer (*i*).

If, however, the objections to the title be remediable, and the purchaser be desirous to enter on the estate, he may in most cases venture to do so; provided the vendor

(*g*) See Doe v. Perkins, 3 Term Rep. 749, and the cases there cited; Burrough v. Martin, 1 Camp. Ca. 112.

(*h*) See 3 P. Wms. 193; Calcraft v. Roebuck, 1 Ves. jun. 226; 12 Ves. jun. 27; and Vancouver v. Bliss, 11 Ves. jun. 464.

(*i*) Burrell v. Brown, 1 Jac. and Walk. 168.

will

will sign a memorandum, importing that the possession taken by the purchaser, shall not be deemed a waver of the objections to the title, or be made a ground for compelling him to pay the purchase-money into court, in case a bill be filed, before the conveyance to him is executed. And a purchaser may, with the concurrence of the vendor, safely take possession of the estate, at the time the contract is entered into, as he cannot be held to have waved objections, of which he was not aware; and if the purchase cannot be completed on account of objections to the title, he will not be bound to pay any rent for the estate, unless perhaps the occupation of it has been beneficial to him (*j*).

A purchaser of any equitable right, of which immediate possession cannot be obtained, should, previously to completing his contract, inquire of the trustee, in whom the property is vested, whether it is liable to any incumbrance. If the trustee make a false representation, equity would compel him to make good the loss sustained by the purchaser, in consequence of the fraudulent statement (*k*). When the contract is completed, the purchaser should give notice of the sale to the trustee. The notice would certainly affect the conscience of the trustee, so as to make him liable in equity, should he convey the legal estate to any subsequent purchaser; and it would also, perhaps, give the purchaser a priority over any former purchaser, or incumbrancer, who had neglected the same precaution (*l*).

It is very usual for auctioneers to prepare the particulars and conditions of sale; but this a vendor should never permit, as continual disputes arise from the mis-statements consequent upon their ignorance of the title to the estate.

(*j*) Hearn *v.* Tomlin, Peake's Ca. 192; see Kirtland *v.* Pounsett, 2 Taunt. 145.

(*k*) Burrowes *v.* Lock, 10 Ves. jun. 470.

(*l*) *Vide infra*, ch. 16.

Where

Where an estate has been in a family for a long time, or the title has not been recently investigated, it might be advisable for the owner to have an abstract of his title submitted to counsel, and any objections which occur to it, cleared up, previously to a contract being entered into for sale of the estate. By this precaution, the vendor will prevent any delay on his part, which might impede the sale from being carried into effect by the time stipulated; and will, in many cases, avoid the expense necessarily attending tedious discussions of a title. Another advantage of this measure is, that if there should be any defect in the title which cannot be cured, it would be known only to the agents and counsel of the vendor. It is of the utmost importance to keep defects in a title from the knowledge of persons not concerned for the owner. It has frequently happened, that persons concerned for purchasers, have communicated fatal defects in a vendor's title, to the person interested in taking advantage of them, by which many titles have been disturbed.

CHAPTER I.

OF SALES BY AUCTION AND PRIVATE CONTRACT.

1. BY three acts (*a*) of his late Majesty's reign, a duty is imposed of 7*d.* for every twenty shillings of the purchase-money, which shall arise or be payable by virtue of any sale at auction in Great Britain, of any interest in possession or reversion, in any freehold, copyhold, or leasehold lands, tenements, houses, or hereditaments.

But sales by way of auction, of estates under the decree of the Court of Chancery, or Exchequer, in England; or of the Courts of Great Sessions in Wales; or of the Court of Session, or Exchequer, in Scotland (*b*), are not liable to the duty; nor do the acts extend to auctions held on the account of the lord or lady of any manor, for granting copyhold or customary lands, for lives or years; or to any auction held for the letting any estate for lives or years to be created by the persons on whose accounts such auctions shall be held (*c*) (I): neither does the duty attach upon the purchase-money of any estate sold under a sheriff's authority, for the benefit of creditors, in execution of any judgment; nor to the purchase-money of any bankrupt's estate, sold by order of the assignees under any commission of bankruptcy (*d*). And, lastly, no auction duty is payable in

(*a*) 27 Geo. III. c. 13. s. 36; 37 Geo. III. c. 14; and 45 Geo. III. c. 30.
(*b*) 19 Geo. III. c. 56. s. 13.
(*c*) Id. s. 14.
(*d*) Id. s. 15.

(I) This mode of letting estates is adopted by the City of London, and some other public bodies.

respect

respect of monies produced by sale of estates, sold by auction, for the redemption of land tax (*e*).

By an order of Lord Rosslyn's (*f*), it is directed, that upon application by a mortgagee of a bankrupt's estate, the mortgaged estate shall be sold before the commissioners, or by public auction, if they shall think fit. And it has been decided (*g*), that a sale of a mortgaged estate by auction, under this order, is liable to the auction duty, and is not within the exception in the acts of sales of bankrupts estates *by the order of the assignees*. This decision was made at *nisi prius*, and, perhaps, cannot be supported. The Legislature intended that the creditors of bankrupts should have the advantage of selling the estates by auction without being charged with the auction duty. Now this intention is, in the case under consideration, clearly subverted by the decision in Coare *v.* Creed. The argument was, that the sale was by the mortgagee, and so not part of the bankrupt's estate. But if the money produced by sale of the pledge is insufficient to cover the mortgagee's debt, he of course resorts to the general effects for a dividend on the residue. If the pledge produce more, the surplus sinks into the general fund; so that assuming, as the Legislature clearly did, that the auction duty is in substance a charge on the land, it in this case takes so much from the bankrupt's property, distributable for the benefit of his creditors. It was considered to be clear, however, that where the estate was sold by order of the assignees, with the consent of the mortgagee, no duty would be payable. But it has been decided, that a sale by assignees of an estate in fee, which was in mortgage for a term of years, was liable to the auction duty, because the assignees sold

(*e*) 42 Geo. III. c. 116. s. 113.
(*f*) 4 Bro. C. C. at the end.
(*g*) Coare *v.* Creed, 2 Esp. Ca. 699.

the

the whole estate, and they had only the equity of redemption (*h*). But the act of Parliament draws no such distinction. Most bankrupts' estates are in mortgage; and the exception would indeed be illusory, if it only extended to estates upon which there was no incumbrance. The simple question however is, whether such a sale is not a *bonâ fide* sale by order of the assignees? It seems, indeed, to have been considered, that the mortgagee had the property, and the bankrupt had only the equity of redemption. But, even at law, the bankrupt had the fee-simple in reversion expectant upon the term of years in the mortgage, and in equity he was owner of the fee in possession, subject to the debt. The case of the King *v.* Abbott, went far beyond the case of Coare *v.* Creed. To avoid the effect of these decisions, assignees must, in future, sell the estate *subject to the mortgage*. The purchaser must, of course, pay off the mortgage out of the purchase-money; and therefore, by the insertion of a few words in the particulars, the creditors may obtain the relief which the Legislature intended to grant them.

The auctioneer, agent, or seller by commission, is bound to pay the auction duty, which he may deduct out of the money he receives at the sale. If he receives none, he may recover it from the vendor by action.

But if the owner of estates sold by auction, or any other person on his behalf, buy in the same, without fraud or collusion, no auction duty will become payable (*i*); provided notice be given in writing (*k*) to the auctioneer before such bidding, signed by the owner and the person intended to be the bidder, of the latter being appointed by the former, and having agreed accordingly to bid at the

(*h*) Rex *v.* Abbott, Excheq. Mich. T. 1816, MS.; 3 Price, 178.

(*i*) 19 Geo. III. c. 56. s. 12.

(*k*) 28 Geo. III. c. 37. s. 20.

sale

sale for his use (*l*); and provided the delivery of such notice be verified by the oath of the auctioneer, as also the fairness of the transaction, to the best of his knowledge.

Neither will the duty be payable where the estate is bought in by or by the order of the steward (*m*) or known agent of the owner, actually employed in the management of the sale of such estate; but notice in writing of his intention must be given by the steward or agent, if he himself bid, or by him and the bidder, if he appoint a person to bid (*n*); and the delivery of such notice must be verified in the same manner as the delivery of a notice given by the owner. And to exempt a vendor from payment of the duty, every notice must, at the time appointed by law for the auctioneer's passing his account of the sale, be produced by the auctioneer to the officer authorized to pass the account of such sale; and also be left with the officer (*o*).

It is not necessary that the sale should be a regular auction. The acts apply to every mode of sale, whereby the highest bidder is deemed to be the purchaser. Therefore, where after an auction at which there was no bidding, the seller's agent stated that he should be ready to treat for the sale by private bargain, and the meeting broke up; and the agent shortly afterwards went into a private room, with several of the persons who attended the sale, and he stated that the highest offer above 50,000 *l.* would be accepted; and offers were accordingly made to him, and he having opened them said that the one which was the highest *would be accepted, provided the terms of payment could be adjusted, and these terms having been adjusted, the bargain was concluded the following day*; this was held to be within the act. The agent put himself under an

(*l*) See a form of such notice, Appendix, No. 1.

(*m*) 42 Geo. III. c. 93. s. 1.

(*n*) See forms of such notices, Appendix, Nos. 2 and 3.

(*o*) 42 Geo. III. c. 93. s. 2.

obligation

obligation to treat with all the persons assembled, and to give the estate to the highest bidder. The question was not, whether this was what was usually called a sale by auction, but whether for the purposes of this act every thing must not be considered as such a sale where the contract was with various persons, with an engagement to let the highest bidder be the purchaser. He might have taken any individual he pleased and concluded a bargain with him; that would have been a transaction of a different kind: but here he treated with a number, and came under an engagement to accept the highest offer (*p*).

Any thing in the nature of a bidding is within the acts; and therefore where the owner put the price under a candlestick in the room, (which is called a dumb bidding), and it was agreed that no bidding should avail if not equal to that, it was holden (*q*) to be within the acts; as being in effect an actual bidding of so much, for the purpose of superseding smaller biddings at the auction.

Upon such a sale by candlestick biddings, as they are denominated, where the several bidders do not know what the others have offered, a bidding of so much per cent. more than any other person has offered, would be binding on the person who makes it (*r*).

So in the case of a female auctioneer who continued silent during the whole time of the sale, but whenever any one bid, she gave him a glass of brandy. The sale broke up, and in a private room he that got the last glass of brandy was declared to be the purchaser. This was decided to be an auction (*s*).

But to bring a bidding within the acts, the sum must be named by the party *eo intuitu*, with a view to the pur-

(*p*) Walker v. Advocate Genl. 1 Dowe, 111.

(*q*) See the case cited, 3 East, 340, Capp v. Topham, *infra*.

(*r*) 3 Mer. 483, *per* Lord Eldon.

(*s*) 1 Dowe, 115.

chase of the estate. Therefore, in the case of Cruso *v.* Crisp (*t*), it was decided, that *putting-up* an estate in lots at certain prices, was not a bidding within the acts; but this has since been doubted by Lord Eldon (*u*); and although it would be difficult to hold the transaction to be a sale within the act, yet of course although the owner intends only to put up the estate at a certain price, and not to bid for it in case of an advance, a previous notice of his intention should be given.

If an estate be bought in by the owner, and proper notices were not given of his intention to bid, the sale will be held real, and the duty must be paid, however fair the transaction may be. The duty is made a *charge* on the auctioneer, which he must pay if the proper notices were not given. It is not given by way of *penalty*. In one case, an auctioneer who had neglected to require proper notices, was compelled to pay 5 or 6,000 *l.* out of his own pocket for the duty, although he had not received any part of it from the owners, nor had charged any commission, as the estates were not actually sold (*w*).

And a statement by an auctioneer to the vendor or his agent, that he has done what is necessary to avoid payment of the duty, will amount to a warranty, although the duty become payable, not by the default, but by the ignorance or mistake of the auctioneer.

Thus, in the late case of Capp *v.* Topham (*x*) an auctioneer put up an estate, and by the conditions of sale reserved a dumb bidding (*y*) to the owner, which was his mode of saving the payment of the auction duty. The owner's solicitor, with the privity of the auctioneer, placed a ticket

(*t*) 3 East, 337.

(*u*) 1 Dowe, 114.

(*w*) Christie *v.* Atty. Gen. 6 Bro. P. C. by Toml. 520; see 3 Ves. jun. 625, n.

(*x*) 6 East, 392; 2 Smith, 443.

(*y*) *Vide supra.*

containir

containing the price in figures, under a candlestick, on a table in the auction-room. A person who attended on behalf of the owner, asked the auctioneer if he had taken the proper precaution to avoid the duty, if there was no sale. The auctioneer said, it was his mode to fix a price under the candlestick, and if the bidding should not come up to the price, there was no sale or duty. There were several biddings, but under the price fixed, and the auctioneer was compelled to pay the duty (*z*). He then brought an action against the owner for recovery of the money as paid to his use; but the statements by the auctioneer were holden to amount to a warranty, and judgment was given for the defendant. Lord Ellenborough said, that even if there was no warranty on the part of the auctioneer, and it was only a mutual error between him and the vendor, he could not call upon his companion in error for a contribution (*a*). So that in cases of this nature the burden will remain upon the person upon whom it is charged. And it even seems to have been considered, that if an auctioneer, through ignorance, adopt an improper mode of saving the duty, upon an undertaking by the seller to save him harmless, the duty must be paid by the auctioneer, and he cannot recover under the undertaking, because it is illegal to indemnify against *penalties* (*b*). But to this it may be objected, that the duty attaches as a charge, and is not imposed as a penalty (*c*).

If the vendor's title prove bad, the auction duty will be allowed; provided complaint thereof be made before the Commissioners of Excise, or two justices of the peace

(*z*) See Christie *v.* Atty. Gen. *ubi sup.*

(*a*) See Farebrother *v.* Ansley, 1 Camp. N. P. 343.

(*b*) Owen *v.* Parry, Sitt. West. Dec. 6, cor. Lord Ellenborough.

(*c*) Christie *v.* Atty. Gen. 6 Bro. P. C. by Toml. 520, *et supra.*

 within

within whose jurisdiction such sale was made (*d*), within twelve calendar months after the sale, if the same shall be rendered void in that time; or otherwise within three months after the discovery of the owner having no title (*e*). But the commissioners will not allow the duty, unless they think that the vendor has used his *utmost exertions* to make a good title. An appeal, however, lies from the judgment of the commissioners: but as the King never pays costs, they fall upon the vendor, and in many cases would amount to more than the duty itself.

II. According to Cicero (*f*), a vendor ought not to appoint a puffer to raise the price, nor ought a purchaser to appoint a person to depreciate the value of an estate intended to be sold. And Huber lays it down (*g*), that if a vendor employs a puffer, he shall be compelled to sell the estate to the highest *bonâ fide* bidder; because it is against the faith of the agreement, by which it is stipulated that the highest bidder shall be the buyer.

In Bexwell *v.* Christie (*h*), Lord Mansfield and the other Judges of B. R. followed the rule of the civil law, and treated a *private* bidding, by or on the behalf of the vendor, as a fraud; but the Legislature, by the subsequent statutes, imposing a duty on sales of estates by auction, seems to have been of a different opinion, and even to have sanctioned it. Lord Rosslyn, who was present at the making of the act, remarked in the case of Connolly *v.* Parsons, that (*i*) the acts of Parliament go upon its being an usual thing and a fair thing for the owner to bid. The

(*d*) 19 Geo. III. c. 56. s. 11.
(*e*) 28 Geo. III. c. 37. s. 19.
(*f*) De Off. l. 3.
(*g*) Prælectiones, xviii. 2. 7.
(*h*) H. 16 Geo. III; Cowp. 395.
(*i*) See 3 Ves. jun. 628.

pressure,

pressure, when the tax was imposed, was by embarrassing people who chose to dispose of their goods by auction if they chose to be purchasers, by the tax falling upon them. His Lordship added, that he thought it would have occurred either to Lord Thurlow or to him, when the exception in favour of the owner was proposed, that the case would not exist, as the owner could not be a bidder; or that, for his attempting to do what he could not by law, it would be just that he should pay the duty. It was very wrong to the public to let that clause stand, if at the time it was understood that the owner bidding was doing an illegal thing. The acts do not require an open notice, but only a private notice to the auctioneer, and an oath to prevent the setting-up a bidding for the owner that the bidder might evade paying the duty.

Lord Kenyon, however, in the case of Howard *v.* Castle, where the purchaser was the only real bidder, and there were several puffers (*k*), clearly coincided with Lord Mansfield's opinion; and held, that unless it was publicly known that the owner intended to bid, it was a fraud upon the purchaser, and consequently no action would lie against him for non-performance of his agreement. The acts of Parliament, he thought, did not intend to interfere with this point, but to leave the civil rights of mankind to be judged of as they were before. And Grose, J. also expressed his opinion, that the doctrine was not in the least impeached by the acts of Parliament.

But in the case of Conolly *v.* Parsons (*l*), Lord Rosslyn said, he fancied the foregoing case turned on the circumstance that there was no real bidder; and the person refused instantly. It was one of those trap auctions which are so frequent in this city. The reasoning went large,

(*k*) 36 Geo. III; 6 Term Rep. 642. See Twining v. Morris, 2 Bro. C. C. 326; and see 3 Term Rep. 93. 95.

(*l*) 3 Ves. jun. 625, n.

certainly, and did not at all convince him. He said, he should wish it to undergo a re-consideration; for if it was law, it would reduce every thing to a Dutch auction, by bidding downwards(I). He felt vast difficulty to compass the reasoning, that a person does not follow his own judgment because other persons bid; that the judgment of one person is deluded and influenced by the biddings of others. The facts of the case of Conolly *v.* Parsons do not appear in the report; but I learn, that there was a contest between real bidders, after the person, employed to bid on the part of the vendors, had desisted from bidding. The suit was compromised by the purchaser paying a considerable sum of money to the vendor to release him from the contract; and consequently Lord Rosslyn did not give judgment; but it seems he was clearly of opinion that the sale was valid.

And in the later case of Bramley *v.* Alt (*m*), where an estate was put up to sale by public auction, and an agent for the vendor bid to 75 *l.* an acre, without public notice

(*m*) 3 Ves. jun. 620.

(I) A sale of this nature is thus conducted: The estate is put up at a high price, and if nobody accept the offer, a lower is named, and so the sum first required is gradually decreased, till some person close with the offer. Thus there is of necessity only one bidding for the estate, a mode of sale which, in this country, would attract few bidders. In some counties in England a singular mode of sale of estates for redemption of land-tax is adopted; the auctioneer states the sum of money wanted, and the number of acres to be disposed of, and the person who will accept the least quantity of land for the sum required, is declared the purchaser; so that the persons bid downwards, until some one name a quantity of land less than any other will take.

The manner of conducting sales by auction of the post-horse duties is at once Dutch and English. The duties are put up at a large sum, named in the particulars, and the sale is then conducted in the same manner as a Dutch auction: but when any person actually bids, others may advance on that bidding, and the highest bidder is declared the purchaser; just as if the sale had been conducted in the usual way.

of

of his intention to do so; and after a contest with real bidders, the estate was bought at 101 *l.* 17 *s.* an acre; Lord Alvanley, then Master of the Rolls, decreed a specific performance with costs. And he concurred with Lord Rosslyn in considering the case of Howard *v.* Castle only as a decision, that where all the bidders except the purchaser are puffers, the sale shall be void.

In the last case on this subject (*n*), it appeared, that assignees of a bankrupt had put up the estate to sale by auction. It was proved that a bidder was employed on their parts to bid up to, but not to exceed 750*l.* the sum for which the estate was actually sold. The Master of the Rolls held, that the assignees had not committed any fraud; they did not employ the bidder for the purpose, generally, of enhancing the price, but merely to prevent a sale at an undervalue, and they stated, previously, what they conceived to be the true value, below which the lot ought not to be sold. His Honor treated the case of Howard *v.* Castle as having proceeded on the ground of plain and direct fraud; and said, that in a similar case he should come to a similar conclusion.

Upon the whole, then, it is clearly settled, that a bidder may be privately appointed by the owner in order to prevent the estate from being sold at an undervalue. And it has been decided, that if there were real bidders at a sale, it must be supported although the bidding immediately preceding that of the purchaser was fictitious (*o*); and where public notice has been given, the contract will be binding on the purchaser, although there was no contest between real bidders; but only the purchaser and the person employed to bid, bid against each other (*p*). It should seem that the rule would be the same, even where

(*n*) Smith *v.* Clarke, 12 Ves. jun. 477.

(*o*) S. C.

(*p*) Oldfield *v.* Round, 5 Ves. jun. 508.

public notice had not been given, provided the bidder was appointed only to protect the vendor's interest.

But it seems, that where the person is employed, not for the defensive precaution, with a view to prevent a sale at an undervalue, but to take advantage of the eagerness of bidders to screw up the price, that will be deemed a fraud (*q*). Neither do the cases authorize the vendor to appoint more than one person on his behalf. It seems highly proper that a vendor should be permitted to appoint a person to *guard* his interests against the intrigues of bidders; but it does not follow that he may appoint more than one. The only possible object of such a proceeding is fraud. It is simply a mock auction; and, notwithstanding Lord Rosslyn's impression, it is universally felt and acknowledged, that the judgments of most men are deluded and influenced by the biddings of others. As far as any aid is sought from the auction duty acts, in support of private biddings on behalf of the owner, it is clear that they do not authorize or sanction the appointment of more than one person. In the report of Conolly *v.* Parsons, it is stated, that *persons* were employed to bid, and did bid for the vendors; but the fact is, that one person only was employed by them, and actually bid on their behalf. The Master of the Rolls observed, in the late case of Smith *v.* Clarke, that he did not see, that if several bidders were employed by the vendor, in that case, a court of equity would compel the purchaser to carry the agreement into execution; for that must be done merely to enhance the price. It was not necessary for the defensive purpose of protection against a sale at an undervalue (*r*).

(*q*) See 12 Ves. jun. 483. In Fitzgerald *v.* Forster, 31st July, 1813, the Vice-Chancellor seemed rather to be of opinion that the appointment of one puffer was, in no case, bad.

(*r*) See 12 Ves. jun. 483; and see 8 Term Rep. 93. 95.

But

But although an original purchaser will not be bound where a fraud has been practised in the biddings, yet if he transfer his contract, a strong case of fraud must be made out against the original purchaser, to enable the court to give the benefit of it to his assignee, who was not induced through competition to give the price (*s*).

If the particulars or advertisements state (as they frequently do), that the estate is to be sold *without reserve*, it seems clear that the sale would be void against a purchaser, if any person were employed as a puffer, and actually bid at the sale. This was actually decided in the late case of Meadows *v.* Tanner (*t*). The Vice-Chancellor said, that the plain meaning of the words *without reserve*, in a particular of sale, is, that no person will be employed to bid on behalf of the vendor for the purpose of keeping up the price; and that the vendor could have no claim to the aid of a court of equity, to enforce a contract against the purchaser, into which he might have been drawn by the vendor's want of faith.

It is generally understood, that some person will bid on the part of the owner; and it therefore seems to deserve consideration, whether it would not, in most cases, be advisable to give public notice of the owner's intention, previously to the sale. Where public notice is given, the mode least liable to objection seems to be that of reserving a bidding, or stipulating in the conditions of sale, that the owner may bid once in the course of the sale (*u*). It may here, however, be proper to observe, that buying in an estate, especially where it is done without public notice, mostly prejudices a future sale. This was exemplified in the sale of an estate before one of the Masters in Chancery, where 23,000*l.* was *bonâ fide* bid, and the estate was bought in by the agent of the vendor; afterwards there

(*s*) See 12 Ves. jun. 484. (*t*) 5 Madd. 34. (*u*) See Cowp. 397.

were

were three other sales in the Master's office; and the consequence of the estate having been bought in, deterring others from bidding, was, that on the two first occasions no more was offered than 12,000*l.* and 6,000*l.*; and the estate finally sold for 15,000*l.* (*w*).

III. The particulars and conditions of sale (*x*) next claim our attention.

It seems that the judges will so construe them as to endeavour to collect the meaning of the parties, without incumbering themselves with the technical meaning of the words.

Thus where (*y*) the city of London let an estate by auction for a term of years, according to certain conditions of sale, by which it was stipulated, that the purchaser should pay a certain *rent* before the lease was granted, which he accordingly agreed to do; the Court of King's Bench held, that though the money to be paid could not be strictly called a rent, the relation of landlord and tenant not having then commenced, yet the parties intended the money should be paid, and it must be paid accordingly. Lord Kenyon said, he had always admired an expression of Lord Hardwicke's, "that there is no magic in words."

Great care, however, should be taken to make the particulars and conditions accurate; for the auctioneer cannot contradict them at the time of sale, such verbal declarations being inadmissible as evidence.

Thus, where estates were put up to sale by auction (*z*),

(*w*) See 6 Ves. jun. 629; Wren *v.* Kirton, 8 Ves. jun. 502; and see Twining *v.* Morris, 2 Bro. C. C. 326.

(*x*) See a form of them, Appendix, No. 4.

(*y*) City of London *v.* Dias, Woodfall's L. and T. 241.

(*z*) Gunnis *v.* Erhart, 1 H. Black. 289; see Jones *v.* Edney, 3 Campb. Ca. 285.

and

and in the printed particulars of sale were stated *to be free from all incumbrances*; they were bought by a person who, discovering that there was a charge on the estate of 17*l.* per annum, refused to complete the purchase, in consequence of which, an action was brought by the vendor; and although he offered to give in evidence, that the auctioneer had publicly declared from his pulpit in the auction-room, when the estate was put up, that it was charged in the manner above specified, yet the court of C. B. refused to admit the evidence, as it would open a door to fraud and inconvenience, if an auctioneer were permitted to make verbal declarations in the auction-room, contrary to the printed conditions of sale; and the plaintiff was nonsuited. And this rule prevails in favour as well of the seller as of the purchaser (*a*).

The same rule of course prevails in equity, where the person setting up the parol evidence is plaintiff. Upon the sale of an estate by auction, the particular was equivocal as to the woods: but it was clear the purchaser was to pay for timber and timber-like trees. There was a large underwood upon the estate. At the sale, the article being ambiguous, the auctioneer declared, he was only to sell the land; and every thing growing upon the land must be paid for. The *defendant*, the purchaser, insisted he was only to pay for timber and timber-like trees, not for plantation and underwood. The declaration at the sale was distinctly proved; but it was determined by the Court of Exchequer, that the parol evidence was not admissible (*b*).

Nor when the seller is plaintiff can parol evidence be admitted on his behalf, of the declarations at the sale, although the purchaser by the written agreement bind

(*a*) Powell v. Edmunds, 12 East, 6.

(*b*) Jenkinson v. Pepys, 6 Ves. jun. 330, cited; 15 Ves. jun. 521, stated.

himself

himself to abide by *the conditions and declarations made at the sale* (*c*).

But a question has been raised, whether, if by a collateral representation a party be induced to enter into a written agreement, different from such representation, he may not have an action on the case for the fraud practised to lay asleep his prudence (*d*).

And if the purchaser have particular personal information given him of an incumbrance, it seems that the parol evidence may be admitted (*e*). The evidence may be used in equity as a *defence* against the specific performance if the parol variation was in favour of the defendant, and the plaintiff seek a performance in specie according to the written agreement (*f*).

If it be the custom in a public auction-room, to paste up the conditions of sale in the room, and the auctioneer announces that the conditions are as usual, they will, if pasted up, according to the usual custom, be binding on the purchaser, although he did not see them (*g*). This can seldom, however, happen upon a sale of estates.

The late Mr. Bradley recommended, that where it is understood, at the time of sale, that the vendor has only a doubtful title, a provisional clause, to the following effect, should be inserted in the conditions of sale and articles of purchase; which would be sufficient, he thought, to obviate any doubt that might otherwise arise at the sale:

(*c*) Higginson *v.* Clowes, 15 Ves. jun. 516.

(*d*) See Powell *v.* Edmunds, 12 East, 6.

(*e*) Gunnis *v.* Erhart, 1 H. Black. 289; and see Pember *v.* Mathers, 1 Bro. C. C. 52; Fife *v.* Clayton, 13 Ves. jun. 546, where the particular was altered before the sale.

(*f*) Higginson *v.* Clowes, *ubi sup.*

(*g*) Mesnard v. Aldridge, 3 Esp. Ca. 271.

"That

"That if the counsel of the purchaser shall, on the examination of the title, be of opinion that a good title and conveyance cannot be made of the purchased premises, within the time limited by the articles for carrying the same into execution; in that case, the same articles shall be discharged, and not further proceeded in on either side."

The estate cannot be too minutely described in the particulars; for although, as Lord Thurlow observed, it is impossible that all the little particulars relative to the quantity, the situation, &c. should be so specifically laid down, as not to call for some allowance and consideration, when the bargain comes to be executed (*h*); yet, if a person, however unconversant in the actual situation of his estate, will give a description, he must be bound by that, whether conusant of it or not (*i*).

Lord Ellenborough has observed, that a little more fairness on the part of auctioneers, in the forming of their particulars, would avoid many inconveniences. There is always either a suppression of the fair description of the premises, or there is something stated which does not belong to them; and in favour of justice, considering how little knowledge the parties have of the thing sold, much more particularity and fairness might be expected. The particulars, his Lordship added, are in truth like the description in a policy of insurance, and the buyer knows nothing but what the party communicates (*k*).

In one case (*l*) the conditions of sale stated a house to be "a free public-house." The lease contained a covenant to

(*h*) See 1 Ves. jun. 224, *per* Lord Thurlow.

(*i*) See 1 Ves. jun. 213, *per* Lord Thurlow; Schneider *v.* Heath, 3 Camp. Ca. 506.

(*k*) See 3 Smith, 439; and see Duke of Norfolk *v.* Worthy, 1 Camp. Ca. 337, and *post*.

(*l*) Jones v. Edney, 3 Camp. Ca. 284.

take

take beer from the lessors; but the auctioneer read over the whole lease in the hearing of the bidders, but he stated erroneously, that the covenant had been decided to be bad. The purchaser brought an action to recover his deposit. Lord Ellenborough said, that in the conditions of sale this is stated to be "a free public-house." Had the auctioneer afterwards verbally contradicted this, he should have paid very little attention to what he said from his pulpit. Men cannot tell what contracts they enter into if the written conditions of sale are to be controuled by the babble of the auction-room. But here the auctioneer, at the time of the sale, declared, that he warranted and sold this a free public-house. Under these circumstances, a bidder was not bound to attend to the clauses of the lease, or to consider their legal operation.

Where a lease is sold, the purchaser is not bound to complete his purchase if any part of the buildings demised have been removed, although he heard the lease read, and the particulars did not comprise the building in question (*m*).

In stating an estate to be of any given "clear" yearly rent, the parties should attend to the meaning of the word "clear," in an agreement between buyer and seller; which is, clear of all outgoings, incumbrances, and extraordinary charges, not according to the custom of the country, as tythes, poor-rates, church-rates, &c. which are natural charges on the tenant (*n*).

The mere exhibition of a plan of a new street, at the time of the sale of a piece of ground to build a house in the line of the intended street, does not amount to an implied contract to execute the improvements exhibited

(*m*) Granger *v.* Worms, 4 Camp. Ca. 83.

(*n*) Earl of Tyrconnel *v.* Duke of Ancaster, Ambl. 237; 2 Ves. 500.

on

on the plan, where the written contract is silent on that head (*o*).

Where the timber and other trees are to be taken by the purchaser at a valuation, it should be stated accurately for what trees he is to pay.

In a case where there were several lots, it was stated after two of them, that the timber on them was to be paid for. The particulars were silent as to the timber on the other lots, which was of considerably greater value; but there was a general condition that all the timber and timber-like trees, down to 1 *s.* per stick inclusive, should be taken at a fair valuation. The purchaser of the lots, to which no statement was annexed, claimed the timber without paying for it; and the Master of the Rolls thought that a purchaser might be so fairly impressed with that idea, notwithstanding the general condition, that he refused to compel him to perform the contract according to the seller's construction (*p*).

But although it should be merely stipulated that the purchaser shall pay for *timber*, yet he must pay for trees not strictly timber, if considered so, according to the custom of the country (*q*).

It is proper, also, to make some provision as to articles not properly fixtures. Lord Hardwicke said, that if a man sells a house where there is a copper, or a brew-house where there are utensils, unless there was some consideration given for them, and a valuation set upon them, they would not pass (*r*).

When the title-deeds cannot be delivered up, some

(*o*) Feoffees of Heriott's Hospital v. Gibson, 2 Dow. 301; see Compton v. Richards, 1 Price, 27.

(*p*) Higginson v. Clowes, 15 Ves. jun. 516.

(*q*) Duke of Chandos v. Talbot, 2 P. Wms. 601; Anon. Ch. 25 July, 1808; Rabbett v. Rackes Woodfall, L. and T. 219. 5th ed. and see Aubrey v. Fisher, 10 East, 446.

(*r*) *Ex parte* Quincey, 1 Atk. 478.

provision

provision should be made as to the expense of the attested copies, and the covenants to produce them, which will otherwise fall upon the vendor (*s*); and where the estate is sold in many lots, and the title-deeds are numerous, nearly the whole purchase-money may, perhaps, be exhausted. In one case, the lots were more than 200, and the copies came to 2,000*l*.

If the estate is leasehold, and the vendor cannot procure an abstract of the lessor's title, this fact should be stated in the conditions (*t*).

A purchaser of a leasehold estate must covenant with the vendor to indemnify him against the rent and covenants in the lease, although he is not expressly required to do so by the conditions of sale (*x*); and it will not vary the case that he is not entitled to any covenants for title; for example, where the sale is by an executor of an assignee (*y*); but assignees of a bankrupt selling a lease which was vested in him, cannot require the purchaser to enter into such a covenant for their indemnity or the indemnity of the bankrupt (*z*).

And although a purchaser is not required by the conditions of sale, to give an indemnity against the rent and covenants, and an assignment is actually executed without any indemnity being given; yet, even a verbal agreement by the purchaser, before the sale, to secure such indemnity, will be carried into a specific execution, if it be distinctly proved (*a*).

(*s*) Dare *v.* Tucker, 6 Ves. jun. 460; and Berry *v.* Young, 2 Esp. Ca. 640, n. See *post*, c. 9.

(*t*) See *post*, ch. 7; and see Denew *v.* Deverell, 3 Campb. 451.

(*x*) See Pember *v.* Mathers, 1 Bro. C. C. 52; and see *post*, ch. 4, as to the obligation of a purchaser of an equity of redemption to indemnify the vendor against the mortgage-money.

(*y*) Staines *v.* Morris, 1 Ves. and Beam. 8.

(*z*) Wilkins *v.* Fry, 1 Mer. 244.

(*a*) Pember *v.* Mathers, 1 Bro. C. C. 52; and see *post*, ch. 3.

Where

Where a vendor is only an assignee of a leasehold estate, and is not bound by covenant to pay the rent, and perform the covenants in the lease, his liability to do so ceases upon his assigning the estate over (*b*), and consequently, in such case, there is not any thing for a purchaser to indemnify against; unless it should be considered that an assignee is bound to indemnify his assignor against the rent and covenants under an implied contract —a question which has been discussed, but not I believe decided.

It should always be stated in the conditions, that the conveyance shall be prepared *by* and at the expense of the purchaser (*c*).

The usual condition, "that if the purchaser shall fail to comply with the conditions, the deposit shall be forfeited, and the proprietors be at liberty to re-sell the estate; and the deficiency, if any, by such sale, together with all charges attending the same, shall be made good by the defaulter," should never be omitted. It forms a lien on the estate for the purchase-money, &c. and if the purchaser do not comply with the conditions, the vendor may, by virtue of this stipulation, re-sell the estate, and recover the deficiency and charges from the purchaser (*d*). And if the money produced by the second sale exceed the original purchase-money, the purchaser who has violated the agreement will not be entitled to the surplus, but the vendor himself will be entitled to retain it.

A stipulation in a contract that in case the vendor can-

(*b*) See 1 Treat. Eq. 2d ed. p. 350, and Fonbl. n. (y) *ibid.*; and see Taylor *v.* Shum, 1 Bos. and Pull. 21.

(*c*) See *post*, ch. 4.

(*d*) *Ex parte* Hunter, 6 Ves. jun. 94; and see Moss *v.* Matthews, 3 Ves. jun. 279; Mertens *v.* Adcock, 4 Esp. Cas. 251; *sed vide* 7 Ves. jun. 275; see Greaves *v.* Ashlin, 3 Camp. 466.

not deduce a good title, or if the purchaser shall not pay the money on the appointed day, the agreement shall be void, does not enable either party to vitiate the agreement, by refusing to perform his part of it: the seller may avoid the contract, if the purchaser do not pay the money; the purchaser may avoid it, if the seller do not make a title; or the contract will be void, if the seller *cannot* make a title; but it it is not sufficient for him to *say* that he cannot (*e*).

If the purchaser, after breaking the condition, become bankrupt, and the estate is re-sold at a loss, the expenses of the sale, &c. being in the nature of unliquidated damages, cannot be proved under the commission; but as the vendor has a lien on the estate, he may apply the money produced by the last sale of the estate, first, in payment of those articles which it is just he should receive, but which he could not prove under the bankruptcy; then, towards payment of the original purchase-money; and the balance may be proved under the commission (*f*).

In a recent case (*g*), a leasehold house and furniture had been sold for 4,370*l.* and *the assignment was executed*, but neither it nor the lease, nor possession, had been delivered; and the purchaser declining to complete the contract, the sellers brought an action and recovered the whole amount of the purchase-money and costs. The purchaser became a bankrupt, and the assignees took possession of the house. The seller then sold the house and furniture at a considerable loss; and Lord Eldon considered that they were entitled to a lien for the amount of the sale and costs, and to a proof for the difference, although it was insisted that they were concluded by their action.

(*e*) Roberts *v.* Wyatt, 2 Taun. 268.

(*f*) *Ex parte* Hunter, 6 Ves. jun. 94; Bowles *v.* Rogers, *ibid.* 95, n.; 1 Cooke, 123.

(*g*) *Ex parte* Lord Seaforth, 1 Rose, 306.

The

The condition which has now become almost universal, that any mistake in the description of the estate, &c. shall not annul the sale, will only guard against unintentional errors.

This was decided by Lord Ellenborough in a case where the estate was stated in the particulars to be *about one mile* from Horsham. It turned out that the estate was between three and four miles from that place. Upon an action brought by the purchaser for recovery of the deposit, it was insisted that the effect of the misdescription was saved by the condition, which provided that no error or misstatement should vitiate the sale. But Lord Ellenborough said, that in cases of this sort he should always require an ample and substantial performance of the particulars of sale unless they were specifically qualified. Here there was a clause inserted, providing that an error in the description of the premises should not vitiate the sale, but an allowance should be made for it. This he conceived was meant to guard against unintentional errors, not to compel the purchaser to complete the contract if he had been designedly misled. His Lordship therefore left it to the jury, whether this was merely an erroneous statement, or the misdescription was wilfully introduced, to make the land appear more valuable from being in the neighbourhood of a borough town. In the former case, the contract remained in force, but in the latter case the plaintiff was to be relieved from it, and was entitled to recover back his deposit. The plaintiff had a verdict; so that the jury must have thought the misdescription fraudulent (*h*).

A bidding at a sale by auction may be countermanded

(*h*) Duke of Norfolk *v.* Worthy, 1 Camp. Ca. 337; see Fenton *v.* Brown, 14 Ves. jun. 144; 1 Ves. and Bea. 377; Stewart *v.* Alliston, 1 Mer. 26; Trower *v.* Newcome, 3 Mer. 704.

at any time before the lot is actually knocked down (*i*); because the assent of both parties is necessary to make the contract binding; that is signified, on the part of the seller, by knocking down the hammer. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. If a bidding was binding on the bidder before the hammer is down, he would be bound by his offer, and the vendor would not, which can never be allowed.

The countermand of a bidding would, in some cases, prove of the most serious consequences; and it might therefore be advisable to stipulate in the conditions of sale, that no persons shall retract their biddings.

Although the duty is, by the acts, imposed on the vendor, yet he is not restrained from making it a condition of sale, that the duty, or any certain portion thereof, shall be paid by the purchaser over and above the price bidden at the sale by auction: and in such case the auctioneer is required to demand payment of the duty from the purchaser, or such portion thereof as is payable by him under the condition: and, upon neglect or refusal to pay the same, such bidding is declared by the acts to be null and void to all intents and purposes (*k*) (I).

It is usual to make some provision respecting the payment of the auction duty, as that the vendor and pur-

(*i*) Payne *v.* Cave, 3 Term Rep. 148.

(*k*) 17 Geo. III. c. 50. s. 8. See 7 Ves. jun. 345.

(I) This provision seems very objectionable. It might be contended, that if a purchaser disliked his bargain, his refusal to pay the auction duty would annul the sale, and throw the whole expense attending it on the vendor, whose estate would still remain unsold. If there be any foundation for this argument, the clause in question should not be permitted to stand in its present shape.

chaser

chaser shall pay it in equal moieties; and indeed, where the purchase-money is liable to the duty, a stipulation of this nature should never be omitted, unless the vendor intend to pay the whole duty himself. If the seller cannot make a title, the purchaser can recover from him the auction duty which he has paid (*l*).

The other provisions which ought to be inserted in conditions of sale, are so well known as not to require notice.

IV. It frequently happens that estates advertised to be sold by auction, are sold by private contract, instead of being brought to the hammer, and the sale is not announced to the public till the day fixed for the auction, and even sometimes not till the auctioneer's appearance in the auction room. Notice of an intended sale by auction is said to be a contract with all the world: and the parties to whom the notice is addressed ought not to be put to the expense and trouble of attending the auction unless the sale is to take place. It should be stated, therefore, in the advertisements, that the estate will be sold by auction at the place and time fixed upon, *unless previously sold by private contract; in which case notice of the sale shall be immediately given to the public:* and notice should be given accordingly.

If an auctioneer sell an estate without a sufficient authority, so that the purchaser cannot obtain the benefit of his bargain, he (the auctioneer) will be compelled to pay all the costs which the purchaser may have been put to, and the interest of the purchase-money, if it has been unproductive (*m*).

(*l*) Cane *v.* Baldwin, 1 Stark. 65.

(*m*) Bratt *v.* Ellis, MS.; Jones *v.* Dyke, MS. App. Nos. 7 and 8; and see Nelson *v.* Aldridge, 2 Stark. 435.

If an attorney or agent bid more for an estate than he was empowered to do, he himself would be liable; but it seems that his principal would not (*n*). But unless he were expressly limited as to price, and not enabled to go beyond the limits of his authority, his principal would be bound (*o*).

Where the principal denies the authority, and the agent is compelled to perform the agreement himself, because he cannot prove the commission, he may afterwards file a bill against his principal; and if the principal deny the authority, an issue will be directed to try the fact; and if the authority be proved, the principal will be compelled to take the estate at the sum which he authorized the agent to bid (*p*).

If an auctioneer give credit to the vendee, or take a bill, or other security, for the purchase-money, it is entirely at his own risk: the vendor can compel him to pay the money (*q*). As between an agent for the seller and a purchaser, it seems that an agent with an undisclosed principal may vary the terms of payment after the sale is completed, the principal may interfere at any time before payment, but not to rescind what has been before done. This is essential to the safety of purchasers. But if a man sell, acting as a broker, the moment the sale is completed he is *functus officii*. The terms of the contract cannot then be altered except by the authority of the principal (*r*).

If a purchaser pay his money to the agent of the vendor before the time when the latter is authorized to receive

(*n*) See Ambl. 498; 10 Ves. jun. 400.

(*o*) Hicks *v.* Hankin, 4 Esp. Ca. 114. See East India Company *v.* Hensley, 1 Esp. Ca. 112.

(*p*) Wyat *v.* Allen, MS. App. No. 9.

(*q*) Williams *v.* Millington, 1 Hen. Blackst. 81; see Wiltshire *v.* Sims, 1 Camp. N. P. 258.

(*r*) See Blackburn *v.* Scholes, 2 Campb. 343.

it, he makes that agent his own for the purpose of paying over the money to the right owner (*s*).

The auctioneer should not part with the deposit until the sale be carried into effect (*t*); because he is considered as a stakeholder, or depositary of it (*u*). In a late case, where the auctioneer was also the attorney of the seller, and paid over the money to the seller, after he knew that objections to the title had been raised, an action against him for the deposit was sustained, but the judges cautiously abstained from pointing out the duty of an auctioneer in any other case (*v*).

If both the parties claim the deposit, the auctioneer may file a bill of interpleader, and pray an injunction, which will be granted, upon payment into court of the deposit, *minus* the auction duty (*w*).

But if, upon a bill filed for an injunction, the Court order the deposit to be paid into court, it will, it seems, be after deducting his charges and expenses (*x*), although perhaps this deserves re-consideration; for the purchaser's deposit may not ultimately be the fund out of which the auctioneer's charges are to be paid; but this is done without prejudice to any question as to so much of the deposit as is retained (*y*).

In a case where 1,000*l.* was paid as a deposit to an auctioneer, according to the conditions of sale, and the vendor opposed two motions by the purchaser, in an original and cross-cause filed concerning the contract, for payment of

(*s*) See Parnther *v.* Gaitskill, 13 East, 432.

(*t*) Burrough *v.* Skinner, 5 Burr. 2639; Berry *v.* Young, 2 Esp. Ca. 640, n.; Spurrier *v.* Elderton, 5 Esp. Ca. 1; and see *post*, ch. 10.

(*u*) Jones *v.* Edney, *cor.* Lord Ellenborough, 4 Dec. 1812.

(*v*) See Edwards *v.* Hodding, 5 Taunt. 815; 1 Marsh, 377.

(*w*) Farebrother *v.* Prattent, 5 Price, 303.

(*x*) Annesley *v.* Muggridge, 1 Madd. 593.

(*y*) Yates *v.* Farebrother, 4 Madd. 239.

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the deposit into court, and the auctioneer became a bankrupt, the loss was holden to fall on the vendor, although the second motion had succeeded, and the day named for payment of the money into court was subsequent to the bankruptcy (*z*). And perhaps a loss by the insolvency of the auctioneer will, in every case, fall on the vendor, who nominates him, and whose agent he properly is (*a*).

And unless an auctioneer disclose the name of his principal, an action will lie against him for damages on breach of contract (*b*).

If an auctioneer do not insert usual clauses in the conditions of sale, whereby the sale of the estate is defeated, he cannot recover any compensation from the vendor for his services: and it is immaterial that he read over the conditions of sale to the seller, who approved of them. The same rule of course applies to negligence generally on the part of the auctioneer, whereby the sale is defeated (*c*).

Where a man is completely the agent of the vendor, a payment to him is in law a payment to the principal; and in an action against the latter for recovery of the deposit, it is immaterial whether it has actually been paid over to him or not (*d*).

It may here be remarked, that a deposit is considered as a payment in part of the purchase-money (*e*), and not

(*z*) Brown *v.* Fenton, *et e cont.* Rolls, 23 June. 1807, MS.; S. C. 14 Ves. jun. 144.

(*a*) See 2 H. Blackst. 592; 13 Ves. jun. 602; 14 Ves. jun. 150; Annesley *v.* Muggridge, 1 Madd. 593; Smith *v.* Lloyd, 1 Madd. 618.

(*b*) Hanson *v.* Roberdeau, Peake's Ca. 120; see Simon *v.* Motivos, 3 Burr. 1921; Owen *v.* Gooch, 2 Esp. Ca. 567; 12 Ves. jun. 352. 484.

(*c*) Denew *v.* Deverall, 3 Campb. 451.

(*d*) Duke of Norfolk *v.* Worthy, 1 Camp. N. P. 337.

(*e*) Pordage *v.* Cole, 1 Saund. 319; see Main *v.* Melbourn, 4 Ves. jun. 720; Klinitz *v.* Surry, 5 Esp. Ca. 267; Ambrose *v.* Ambrose, 1 Cox, 194.

as

as a mere pledge; which was also the rule of the civil law, where money was given; but if a ring, &c. was given by way of earnest, or pledge, it was to be returned (*f*).

If, pending a suit for specific performance, a deposit be laid out in the public funds under the authority of the Court, it will be binding on both vendor and vendee; and, if laid out without opposition by the seller, it must be presumed to be with his assent; and, in either case, he must take the stock as he finds it (*g*).

If a purchaser is entitled to a return of his deposit, he is not compellable to take the stock in which it may have been invested, unless such investment were made under the authority of the Court, or with his assent. And an assent will not be implied against a party because notice was given to him of the investment, to which he made no reply (*h*). Therefore, where the deposit is considerable, and it is probable that the purchase may not be completed for a long time, it seems advisable for the parties to enter into some arrangement for the investment of the deposit.

As a vendor will not be subject to any loss by the investment of the purchase-money in the funds without his assent, so he will not be entitled to any benefit by a rise in the funds, although the purchaser gave him notice of the investment; unless he (the vendor) agreed to be bound by the appropriation. Sir William Grant has observed, that a deposit does not impose a liability or responsibility upon the party to whom notice of it is given; throwing upon him any risk as to the principal. The principal remains entirely at the risk of the party making the deposit. He

(*f*) Vinnius, l. 3. 24.

(*g*) Poole *v.* Rudd, 3 Bro. C. C. 40; and see Doyley *v.* the Countess of Powis, 2 Bro. C. C. 32; 1 Cox, 206.

(*h*) Roberts *v.* Massey, 13 Ves. jun. 561.

cannot,

cannot, by depositing the money with his bankers, throw the risk of their credit upon the other parties. They are not called upon to express their opinion of that bank, or to say any thing upon the subject. There is no difference between that and a deposit at the Bank of England, or a conversion of the money into stock; as the one party has no more right to make the other consent to have the fund laid out in stock than in a private bank (*i*).

No objection can be made to the whole of the deposit required by the conditions, not being paid by the purchaser, if the vendor, after the sale, agree to accept a less sum (*k*).

Although the deposit be forfeited at law, yet equity will, in general, relieve the purchaser, upon his putting the vendor in the same situation as he would have been in had the contract been performed at the time agreed upon (*l*). But if a bill by a purchaser for a specific performance is dismissed, the Court cannot order the deposit to be returned: as that would be decreeing relief (*m*).

It is well settled, that assignees of a bankrupt are not bound to take what Lord Kenyon calls a *damnosa hæreditas*, property of the bankrupt, which so far from being valuable, would be a charge to the creditors; but they may make their election: if, however, they do elect to take the property, they cannot afterwards renounce it, because it turns out to be a bad bargain (*n*). This observation is made as an introduction to a late case (*o*), in which it was

(*i*) Roberts *v.* Massey, *ubi sup.*; Acland *v.* Gainsford, 2 Mad. 28.

(*k*) Hanson *v.* Roberdeau, Peake's Ca. 120. See *ex parte* Gwynne, 12 Ves. jun. 378; and 1 Campb. Ca. 427.

(*l*) Vernon *v.* Stephens, 2 P. Wms. 66; Moss *v.* Matthews, 3 Ves. jun. 279.

(*m*) Bennet College *v.* Carey, 3 Bro. C. C. 390.

(*n*) See 7 East, 342.

(*o*) Turner *v.* Richardson, 7 East, 336; Wheeler *v.* Bramah, 3 Campb. 340; Copeland v. Stephens, 1 Barn. and Ald. 593.

decided

decided that the assignees of a bankrupt could not be charged as assignees of the lease, where they had not entered into actual possession, but merely put up the property to sale by auction without stating to whom it belonged, or on whose behalf it was sold, and no person bid at the sale: the Court considered this as a mere experiment to enable the assignees to judge, whether the lease were beneficial or not, and compared it to a valuation by a surveyor. If the assignees do accept the property, the bankrupt is by a late act (*p*) relieved from the rent and covenants, and the lessor is enabled in a summary way to compel the assignees to make their election either to accept the same or deliver up the lease and possession of the estate. Upon this provision there is a great contrariety of opinion, whether the effect of a disclaimer by the assignees, is to vest the property in the bankrupt or the lessor.

Immediately after sale of an estate by auction, an agreement (*q*) to complete the purchase should be signed by the parties or their agent, because sales by auction of estates are within the statute of frauds (*r*); and consequently, the contract could not be enforced against either of the parties who had not signed an agreement. Although a man purchase several lots, yet a distinct contract arises upon each lot, and consequently if no lot is of the value of 20*l.* no stamp is necessary, although altogether they are of more value (*s*); but they may all be comprised in one agreement.

The above observation, in regard to the necessity of a writen agreement, of course, applies to sales by private contract (*t*); as indeed do all the foregoing observations,

(*p*) 49 Geo. III. c. 121. s. 19. See *ex parte* Pomeroy, 1 Rose, 57; *ex parte* Nixon, 1 Rose, 445.

(*q*) See a form of an agreement, Appendix, No. 5.

(*r*) See *post*, ch. 3.

(*s*) Emmerson *v.* Heelis, 2 Taunt. 38.

(*t*) See *post*, ch. 3. See a form of an agreement, Appendix, No. 6.

which

which do not in their nature apply exclusively to sales by auction.

As agreements for sale of estates are generally entered into by the attornies of the parties, it may, in this place, be proper to observe, that where an attorney enters into an agreement on behalf of his principal, the agreement should be made and signed in the name of the principal by him as attorney: for if an attorney covenant in *his own* name for *himself, his heirs*, &c. he will himself be personally bound, though he be described in the instrument as covenanting for and on the part of his principal (*u*).

Where an estate is sold in lots, whether by public auction or private contract, the vendor should take attested copies of the parcels included in the different conveyances; in order to satisfy a cautious purchaser of any part of the estate, that no part of the estate bought by him is included in any of the conveyances to the other purchasers.

It may here be observed, that if a man agree to get another so much for his estate, and actually provide a purchaser with whom the owner agrees for the sale of the property, at the sum stipulated, and a deposit is paid, the first agreement will be performed, although the purchaser cannot perform the agreement if the seller let him off, and retain the deposit as a forfeiture (*w*).

V. By a late act (*x*), the following duties are imposed upon every valuation or appraisement of any estate, or

(*u*) Appleton v. Binks, 5 East, 148; Kendray v. Hodgson, 5 Esp. Ca. 228. See Duke of Norfolk v. Worthy, 1 Camp. N. P. 337; Bowen v. Morris, 2 Taunt. 375.

(*w*) Horford v. Wilson, 1 Taunt. 12.

(*x*) 55 Geo. III. c. 184. See Lees v. Burrows, 12 East, 1.

effects

effects, real or personal, or of any interest therein, or of the annual value thereof; viz. where the amount does not exceed 50*l.* a duty of 2*s.* 6*d.*; where it exceeds 50*l.* but does not exceed 100*l.* a duty of 5*s.*; where it exceeds 100*l.* and does not exceed 200*l.* a duty of 10*s.*; where it exceeds 200*l.* and does not exceed 500*l.* a duty of 15*s.*; and where it exceeds 500*l.* a duty of 20*s.*

CHAPTER II.

OF SALES UNDER THE AUTHORITY OF THE COURTS OF EQUITY.

SECTION I.

Of the Proceedings from the Advertisements to the Conveyance.

WE have already seen, that sales under the decrees of the Court of Chancery, or Exchequer, are not liable to the auction duty, and that public notice of a vendor's intention to bid for the estate is not necessary, where a single bidder is employed to prevent the estate from being sold at an under value; it follows, that *no* notice need be given previously to the sale of an estate under a decree, of the vendor's intention to buy in the estate, if a particular price be not bid for it. At the same time, it must be observed, that where a fraud is committed on the purchaser by puffing at the sale, it cannot be supported, any more than a sale by auction under similar circumstances (*y*); but the Court will, in a proper case, authorize a bidding to be reserved, and to be made one of the conditions of sale (*z*).

Where an estate is directed to be sold before a Master, the particulars of sale are prepared by the plaintiff's solicitor: after they are allowed by the Master, the advertisement for sale must be prepared, either by the plaintiff's solicitor, or by the Master's clerk, and the signature of the

(*y*) *Vide supra*, p. 20.

(*z*) Jervoise *v.* Clarke, 1 Jac. & Walk. 389.

Master

Master must be obtained to authorize the insertion of the advertisements in the Gazette. There are always two advertisements (*a*): in the first, no time is appointed for the sale. About three weeks or a month after the insertion of the first advertisement, a warrant must be taken out to fix a time for the sale, and it must be served on all the parties' clerks in court. The warrant being attended, the Master, with the approbation of all parties, will fix the time; and the second advertisement, which is usually called the peremptory advertisement, stating the time, must then be prepared, and inserted in the Gazette (*b*). The estate may be sold either before the Master; or, if from the situation and nature of the estate, the sale ought not to take place in town, it may be sold in the country before the Master's clerk, or any other person authorized by the Master (*c*).

The plaintiff's solicitor should attend at the sale, which is conducted in the following manner: The Master's clerk prepares a particular of the lots to be sold, with spaces between each lot. The lots are successively put up at a price offered by any person present, and every bidder must sign his name and the sum he offers, in the space on the particular, under the lot for which he bids; and formerly 2*s.* 6*d.* was paid to the Master's clerk for every bidding; but that regulation, which had a tendency to damp the sale, has lately been very properly abolished, and in lieu of the half-crowns, a sum is allowed to the clerk, as part of the expenses attending the sale. The best bidder is of course declared the purchaser. If any lots are not sold, they must be again advertised for sale (*d*).

(*a*) 2 Fowl. Prac. 305.

(*b*) See 1 Turner's Practice by Ven. 127.

(*c*) See 2 Fowl. Prac. 305.

(*d*) See 1 Turn. Prac. 129; 2 Fowl. Prac. 306, 307.

funds,

The payment of a deposit, and the investment of it in the funds, are governed by the same rules as are adhered to where the contract is between party and party (*e*).

The Court will, on motion, discharge the purchaser, and substitute any other person in his stead; but this will not be done unless such person pay in the money, and an affidavit be made that there is no under-bargain; for the new purchaser may give the other a sum of money to stand in his place, and so deceive the court (*f*). Formerly the practice seems to have been to require the consent of all the parties in the cause, as well as the consent of the original purchaser (*g*).

Although more of an estate is sold than is necessary for the purposes of the trust by virtue of which the decree was made, yet the purchaser can make no objection to it, the decree being a sufficient security to him, as it cannot appear but that it was right to sell the whole. If, however, the decree were, that the Master should sell Greenacre, and he sells Blackacre, an objection to the sale would be good (*h*); although it seems that it may be laid down as a general rule, that a purchaser shall not lose the benefit of his purchase by any irregularity of the proceedings in a cause (*i*). If a decree is obtained by fraud, it may, of course, be relieved against (*k*); and it has been said that a purchaser is bound to see, that, at least as far as appears on

(*e*) *Vide supra*, p. 41; Ambrose v. Ambrose, 1 Cox, 194.

(*f*) Rigby v. M'Namara, 6 Ves. jun. 515; Vale v. Davenport, 6 Ves. jun. 615.

(*g*) Mathews v. Stubbs, 2 Bro. C. C. 291.

(*h*) Lutwych v. Winford, 2 Bro. C. C. 248.

(*i*) Lloyd v. Johnes, 9 Ves. jun. 37; Curtis v. Price, 12 Ves. jun. 89; Bennett v. Harnell, 2 Scho. and Lef. 566; Burke v. Crosbie, 1 Ball and Beat. 489; Lightburne v. Swift, 2 Ball and Beat. 207. See Baker v. Morgan, 2 Dowe, 526.

(*k*) Kennedy v. Daly, 1 Schoales and Lefroy, 355; Giffard v. Hort, *ib*

the

the face of the proceedings before the Court, there is no fraud in the case (*l*); but, if the Court itself is imposed upon, it would be a strong measure to *imply* notice of the fraud to the purchaser, from the very proceedings before the Court.

But a person having a legal lien, as a judgment creditor not coming in under the decree, would not be bound by it, and might proceed against the purchaser, unless he obtained a legal interest overreaching the lien; in which case the claim being merely in equity, the Court would protect the purchaser buying under its decree (*m*), or rather would not lend its aid to the judgment creditor against him.

In sales by auction or private agreement, the contract is complete when the agreement is signed; but a different rule prevails in sales before a Master; the purchaser is not considered as entitled to the benefit of his contract till the Master's report of the purchaser's bidding is absolutely confirmed; and I shall now proceed to show what steps a purchaser must take to obtain an absolute confirmation of the Master's report.

The purchaser must first, at his own expense, procure a report from the Master, of his being the best bidder for the lot he has purchased. After the report is filed, and an office-copy of it taken by the purchaser, he must, at his own expense, apply to the Court by motion, of which no notice need be given (*n*), that the purchase may be confirmed. Upon this application the order will be confirmed *nisi* (*o*), that is, unless cause be shown against the same in eight days after service. The purchaser must, at his own expense, procure an office-copy of this order from the Register. If no cause be shown within the eight days, the purchaser must, at his own expense, apply to the Court

(*l*) Gore *v.* Stacpole, 1 Dowe, 30.

(*m*) Barrett *v.* Blake, 2 Ball and Beat. 354.

(*n*) See Parker's Analysis, 141.

(*o*) For a form of the order, see 2 Fowler's Pract. 308.

to confirm the report absolutely, which will be done of course (*p*), on an affidavit of the service of the order (*q*), and a certificate of no cause having been shown. The certificate is obtained from the Register by application to the entering clerk, and leaving the order *nisi* the day before. Notice of this application need not be given (*r*).

The bidder not being considered as the purchaser until the report is confirmed, is not liable to any loss by fire or otherwise which may happen to the estate in the interim (*s*); nor is he, until the confirmation of the report, compellable to complete his purchase (*t*); but upon the report being confirmed, he will be compelled to carry the contract into execution (*u*).

If the purchaser neglect to complete his purchase, the practice is, to confirm the report, and then if the purchaser is supposed to be responsible, to get an order to inquire whether the party can make out a good title (*x*), and if he can, to obtain an order upon the purchaser to complete his purchase (*y*); (I) but if the purchaser is

(*p*) For a form of the order, see 2 Fowler's Pract. 311.

(*q*) For forms of the affidavit, see 2 Turn. Pract. 503. 522; Parker's Anal. 98; 2 Fowl. Pract. 310.

(*r*) See 1 Turn. Pract. 129.

(*s*) *Ex parte* Minor, 11 Ves. jun. 559; see 13 Ves. jun. 518; 1 Jac. and Walk. 639.

(*t*) Anon. 2 Ves. jun. 335.

(*u*) Barker *v.* Holford, and Eggington *v.* Flavel, 2 Anstr. 344, cited.

(*x*) Notice must be given of the motion for this order. For a form of the notice, see 2 Turner, 650.

(*y*) See 2 Fowl. Pract. 318. 325.

(I) A motion was made before Lord Erskine, that the purchase-money should be paid in by the purchaser. The purchaser did not appear. After consulting the Register, who had searched for precedents, and expressing his unwillingness to do any thing to prejudice sales by the Court, the Chancellor refused the motion, but ordered the title to be referred to the Master; and then, he said, if a good title could be made, he would compel payment of the money according to the usual practice. Anon. Ch. 22d July, 1806, MS.

unable

unable to complete his purchase, then on the report being confirmed, it is moved to discharge him from the bidding (*z*), and notice of this motion must be given to the purchaser (*a*). But a purchaser will not be permitted to baffle the Court; and therefore, instead of discharging the purchaser from his bidding, the Court will, if required, make an order that he shall, within a given time, pay the money, or stand committed (*b*).

When the report is absolutely confirmed, the purchaser is entitled to a conveyance on payment of the purchase-money, and may, after giving notice of his intention (*c*), apply to the Court for leave to pay his purchase-money into the Bank (*d*), and to be let into possession of the estate; but this application should of course not be made until the title be approved of (*e*). When the money is paid according to the order, the purchaser must, at his own expense, obtain a certificate of the payment of it.

If the estate be subject to an incumbrance, which appears upon the report, the purchaser should, after giving notice of his intention (*f*), apply to the Court for leave to pay off the charge, and to pay the residue of the purchase-money into the Bank. But where an incumbrance on the estate does not appear on the report, and any of the parties refuse, or are incompetent to consent, a purchaser cannot apply any part of his purchase-money in discharge of

(*z*) Cunningham *v.* Williams, 2 Anstr. 344.

(*a*) For a form of the notice, see 2 Turn. Pract. 651.

(*b*) Lansdown *v.* Elderton, 14 Ves. jun. 512.

(*c*) For forms of the notice, see 2 Turn. Pr. 647; Park. Anal. 140.

(*d*) For the mode of paying the money into the Bank, see 1 Turn. Pract. 210; and for a form of the order, see 2 Fowl. Pract. 313.

(*e*) See 2 Fowl. Pract. 317.

(*f*) For a form of such notice, see 2 Turn. Pract. 648.

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the incumbrance, though perhaps, if the parties be all competent to consent and do consent, it may be done (*g*).

Where two or more persons purchase one lot, the money must be paid altogether; the Court will not allow them to pay their proportions separately, on account of the confusion which might ensue (*h*).

A purchaser under a decree is entitled to be let into possession of the estate from the quarter-day preceding his purchase, paying his money before the following one (*i*). But this rule does not apply to a colliery, which is considered as a trade. The profits are settled monthly, and therefore the purchaser is entitled to the profits only from the commencement of the month in which he purchased, paying his purchase-money in the course of that month (*j*).

If a life interest in stock be sold, the purchaser is entitled to the dividend which becomes due after the sale, although it falls due the very day after (*k*).

A purchaser is not entitled to the rents for a period beyond the quarter-day preceding the payment of his money, merely because he has been ready to complete his purchase, and had his money ready lying dead in a banker's hands; for he might have moved to pay the money into Court, when it would have been laid out; and this, if done by special application, would not have been an acceptance of the title (*l*).

If a purchaser enter into possesion, he will be compelled to pay the money into Court, although he entered with the permission of the parties in the cause. The Court only can give such permission (*m*).

(*g*) —— *v.* Stretton, 1 Ves. jun. 266.

(*h*) Darkin *v.* Marye, 1 Anst. 22.

(*i*) Twigg *v.* Fifield, 13 Ves. jun. 517; see Garrick *v.* Earl Camden, 2 Cox, 231; *vide post*, ch. 10.

(*j*) Wren *v.* Kirton, 8 Ves. jun. 502.

(*k*) Anson *v.* Towgood, 1 Jac. and Walk. 637.

(*l*) Barker *v.* Harper, Coop. 32.

(*m*) Anon. L. I. Hall, 16 July 1816, MS.

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When the report is absolutely confirmed, and every thing arranged, the draft of the conveyance must be drawn by the purchaser's solicitor, and either settled by the Master, if the parties insist upon it, or, which is more customary, by a conveyancing counsel of whom the Master approves. Sufficient time must be allowed for copies to be made for such parties in the cause as require them, and then warrants must be taken out to proceed on the draft. The Master's clerk will, at the purchaser's expense, ingross the deed, procure the report or certificate of its being allowed, and then deliver the deeds to the purchaser; and it is usual to obtain the Master's signature to every skin. The report must be filed, and an office-copy of it taken (*n*).

It is usual, however, to so word decrees, that the draft shall not go before the Master *unless the parties differ.* Where this mode is adopted, the business is transacted in the same way as upon a sale by private contract, unless the parties cannot agree, in which case, resort is had to the Master.

When the deeds have been properly executed by all necessary parties, an affidavit of the due execution of them must be made, and filed in the affidavit office, and an office-copy of the affidavit must be taken: this being done, the money directed to be paid in consequence thereof, may be procured in the usual manner (*o*).

If the parties disagree as to the necessary parties, &c. to the conveyance, the Master will report his approbation of the draft, as settled by him. To this report exceptions may be taken (*p*), and then the question will come before the Court in a regular way.

(*n*) 1 Turn. Pract. 145.
(*o*) 1 Turn. Pract. 145.
(*p*) Lloyd *v.* Griffith, 1 Dick. 103; Tipping *v.* Gartside, 2 Fowl. Pract. 328; Wakeman *v.* Duchess of Rutland, 3 Ves. jun. 504.

So if the parties differ as to the validity of the title to the estate, the Master must make his report upon the title, to which exceptions may in like manner be taken (*q*).

If a purchaser of an estate under a decree of the Court, after the absolute confirmation of the report, and before any conveyance made to him, die, having devised his interest therein, the Court will order a conveyance to be made to the devisees, without the consent of the testator's heir at law, where he is an infant (*r*).

If an estate directed to be sold before a Master, is sold by private contract, or in any other manner contrary to the order of the Court, and not actually conveyed to the purchaser, the Court will not take notice of the sale, but will direct the estate to be sold before the Master according to the decree (*s*). And a person who has notice of the decree cannot be advised to purchase the estate unless it be sold before the Master (*t*): and the money should be paid into court and not to the party (*u*).

If an estate be sold contrary to the order of the Court, and the purchaser had notice of the decree, he will have no remedy; but if he bought without notice, he may recover at law for breach of the agreement (*w*).

A sale before a Master is not within the statute of frauds, and after confirmation of the Master's report of the best purchaser, the sale will be carried into effect even against the representative of the purchaser, although he did not subscribe; the judgment of the Court taking it out of the statute (*x*).

(*q*) For forms of exceptions, see 2 Turn. Pract. 589.

(*r*) The King *v.* Gregory, 4 Price, 380.

(*s*) Annesley *v.* Ashurst, 3 P. Wms. 282. See and consider *ex parte* Hughes, 6 Ves. jun. 617.

(*t*) See 2 vol. Ca. and Opin. 224, 225.

(*u*) See 2 Scho. and Lef. 581.

(*w*) Raymond *v.* Webb, Lofft, 66: See Mortlock *v.* Buller, 10 Ves. jun. 314.

(*x*) Att. Gen. *v.* Day, 1 Ves. 218.

And

And even if the authority of an agent not being admitted cannot be proved, yet if the Master's report could be confirmed, the sale would be carried into execution unless some fraud were proved (*y*).

SECTION II.

Of opening the Biddings, and of rescinding the Contract.

THUS far we have traced a sale before a Master where no opposition is made to the absolute confirmation of the Master's report of the best bidder, and the sale is regularly concluded. But where estates are sold before a Master under the decree of a court of equity, the Court considers itself to have a greater power over the contract than it would have were the contract made between party and party (*z*); and as the chief aim of the Court is to obtain as great a price for the estate as can possibly be got, it is in the habit of opening the biddings after the estate is sold. It seems to have been thought that the same rule may be extended to sales under a commission of bankruptcy (*a*). This, however, never has been done, nor is there any reason to apprehend that so mischievous an extension of the rule will ever take place.

Where a person is desirous of opening a bidding, he must, at his own expense, apply to the Court by motion for that purpose, stating the advance offered. Notice of the motion must be given to the person reported the purchaser of the lot, and to the parties in the cause (*b*). If the Court approve of the sum offered, the application will

(*y*) Att. Gen. *v.* Day, 1 Ves. 218. and Beatty, 209.

(*z*) See 1 P. Wms. 747.

(*a*) *Ex parte* Partington, 1 Ball and Beatty, 209.

(*b*) For a form of the notice, see 2 Turn. Pract. 649, 650.

be granted, and on the order being drawn up, entered and served, a new sale must be had before the Master. The order is made at the expense of the person opening the biddings, and he must bear the expense of paying in his deposit, and pay the costs of the first purchaser (*c*), and interest at the rate of 4*l.* per cent. on such part of the purchase-money as the Master shall find to have lain dead (*d*).

Mere advance of price, if the report of the purchaser being the best bidder is not absolutely confirmed, is sufficient to open the biddings, and they will be opened more than once, even on the application of the same person, if a sufficient advance be offered (*e*); but the Court will stipulate for the price, and not permit the biddings to be opened upon a small advance (*f*); and, although an advance of 10 per cent. used generally to be considered sufficient on a large sum, yet no such rule now prevails (*g*); but in the case of a sale under a creditor's suit, the Court permitted the biddings to be opened, upon an advance of 5 per cent. on 10,000*l.* (*h*). Biddings, it seems, will not be opened, unless 40*l.* at least be offered in advance (*i*).

The determinations on this subject assume a very different aspect when the report is absolutely confirmed. Biddings are in general not to be opened after confirma-

(*c*) 2 Fowl. Pract. 318; 1 Turner's Pract. 131.

(*d*) This was directed on opening the biddings for Gen. Birch's estate, MS.

(*e*) Scott *v.* Nisbitt, 3 Bro. C. C. 475; Hodges *v.* Jones, 2 Fowl. Pract. 318; see Baillie *v.* Chaigneau, 6 Bro. P. C. by Toml. 313; Preston *v.* Barker, 15 Ves. jun. 140.

(*f*) Anon. 1 Ves. jun. 453; Anon. 2 Ves. jun. 487; Upton *v.* Lord Ferrers, 4 Ves. jun. 700; and Anon. 5 Ves. jun. 148.

(*g*) Andrews *v.* Emerson, 7 Ves. jun. 420; White *v.* Wilson, 14 Ves. jun. 151. See Anon. 3 Madd. 494.

(*h*) Brooks *v.* Snaith, 3 Ves. and Bea. 144.

(*i*) Farlow *v.* Weildon, 4 Madd. 460.

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tion of the report (*j*): increase of price alone is not sufficient, however large, although it is a strong auxiliary argument where there are other grounds.

In a case (*k*), however, before Lord Rosslyn, this rule, although so frequently acknowledged and acted upon, was not attended to, but biddings were opened after the report was absolutely confirmed, merely on an advance of price. This case is now completely overruled.

But very particular circumstances may perhaps induce the Court to open the biddings after confirmation of the report, if the advance be considerable (I).

Thus, in a case (*l*) where the owner of the estate (who joined in a motion for the purpose of opening biddings after the report was absolutely confirmed) was in prison at the time of the confirmation, and it appeared that he would have opened the biddings before confirmation of the report, had he been able, and had even directed persons to bid more than what the estate sold for, who deceived him, and an advance of 4,000*l.* (being more than one-fourth of the original purchase-money) was offered, the biddings were opened on the deposit of the 4,000*l.* being made.

Strong as the circumstances in this case were, Lord Eldon, in a late case, expressed great disapprobation of the

(*j*) 2 Ves. jun. 53; Scott v. Nisbitt, 3 Bro. C. C. 475; Boyer v. Blackwell, 3 Anstr. 656; Prideaux v. Prideaux, 1 Bro. C. C. 287; 2 Ves. jun. 53; 1 Cox, 35.

(*k*) Chetham v. Grugeon, 5 Ves. jun. 86; and see his Lordship's decision in Prideaux v. Prideaux, *ubi sup.* when Lord Commissioner.

(*l*) Watson v. Birch, 2 Ves. jun. 51; 4 Bro. C. C. 172.

(I) In Ireland, a sale under a decree was actually set aside after the purchaser was put in possession, and the conveyance to him executed and registered, because another person offered 200*l.* more than the purchaser had paid. Conran v. Barry, Vern. and Scriv. 111. See *Ex parte* Partington, 1 Ball and Beatty, 209.

decision,

decision, and determined generally, that after a purchaser has confirmed his report, unless some particular principle arises out of his character, as connected with the ownership of the estate, or some trust or confidence, or his own conduct in obtaining his report, the bidding ought not to be opened (*m*).

And Lord Redesdale, also, in a case before him, held that biddings could not be opened after the report was absolutely confirmed unless, on the ground of fraud on the part of the purchaser. And he considered it to the advantage of suitors, to observe greater strictness in opening biddings, as it would procure better sales (*n*).

In a still later case, Lord Eldon adhered to the same rule, and said that he could not do a thing more mischievous to the suitors than to relax farther the binding nature of contracts in the Master's office: half the estates that are sold in the Court being thrown away upon the speculation that there will be an opportunity of purchasing them afterwards by opening the biddings (*o*).

Fraud will, of course, be a sufficient ground for opening the biddings. Therefore, if the parties agree not to bid against each other (*p*), or a survey be made of an estate with some degree of collusion with the tenants (*q*), and it misrepresents the value and quality of the estate, and some of the purchasers are aware of this fraud in making the survey, and the owner is ignorant of it; or the purchaser of the estate be partner with the solicitor of the cause, and is in possession of some particular knowledge to the benefit of which the other parties were entitled (*r*);

(*m*) Morice *v.* the Bishop of Durham, 11 Ves. jun. 57.

(*n*) Fergus *v.* Gore, 1 Schoales and Lefroy, 350.

(*o*) White *v.* Wilson, 14 Ves. jun. 151.

(*p*) See 2 Ves. jun. 52.

(*q*) Ryder *v.* Gower, 6 Bro. P. C. 148; and see 2 Ves. jun. 53.

(*r*) Price *v.* Moxon, July 14, 1754, before Lord Hardwicke. See 6 Bro. P. C. 155; 2 Ves. jun. 54.

in

in all these cases, the Court would open the biddings, although the report had been absolutely confirmed.

Where the biddings are opened, the advance is ordered to be deposited immediately (*s*), and the costs of the purchaser to be paid by the persons opening the biddings (*t*); but the Court will not direct the Master to allow a specific expense (*u*).

If the biddings are opened, the estate may be allotted for sale in a different manner to what it at first was (*x*).

As the biddings are opened for the benefit of the suitor, no other person will be favoured in that respect.

Thus, upon a motion to open a bidding of 5,020*l.* (*y*) upon the ground of mistake as to the time of sale, and an over-bidding of 150*l.*; the Lord Chancellor refused it, saying, he would not open it for a less sum than 500*l.* and that the circumstance that the bidder was too late, was no ground at all.

The person who is desirous of opening the biddings having been present at the sale, is no objection to their being opened, although a greater advance may, on that account, be required (*z*). Nor is it material that the applicant is entitled to a part of the produce of the estates (*a*).

A man opening the biddings on behalf of a person not in existence, will himself be decreed to be the purchaser (*b*).

Where a person is permitted to open the biddings upon

(*s*) Anon. 6 Ves. jun. 513.

(*t*) See Watts *v.* Martin, 4 Bro. C. C. 113; and see *ibid.* 178; Upton *v.* Lord Ferrers, 4 Ves. jun. 700.

(*u*) Anon. 2 Ves. jun. 286.

(*x*) Watts *v.* Martin, 4 Bro. C. C. 113.

(*y*) Anon. 1 Ves. jun. 453.

(*z*) Rigby *v.* M'Namara, 6 Ves. jun. 117. See Tait *v.* Lord Northwick, 5 Ves. jun. 655; see 15 Ves. jun. 14; and see M'Cullock *v.* Cotbatch, 3 Madd. 314, where the Vice-Chancellor ruled *contra*.

(*a*) Hooper *v.* Goodwin, Coop. 95.

(*b*) Molesworth *v.* Opie, 1 Dick. 289.

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the usual terms, paying the costs, and making a deposit, and the estate is bought by another person, the person opening the biddings is entitled to take back his deposit; but he is not entitled to an allowance for his costs, as they are in the nature of a premium paid by him for the opportunity of bidding (*c*).

Under special circumstances, however, they might be allowed. If a person come forward for the benefit of the family, and the estate at the first sale was knocked down by mistake, or sold at a great under-value, he will be allowed his expenses (*d*).

It seems, that if a person purchase several lots of an estate, and the biddings are opened as to one, he shall have an option to open them all (*e*).

The authority which the Court has over these contracts, enables it in a proper case to relieve the purchaser as well as the suitor.

Therefore, where the contract is inequitable, the purchaser, on submitting to forfeit his deposit, will be discharged from his purchase (*f*). Where, however, the contract is not inequitable, a purchaser must proceed in his purchase, and will not be permitted to forfeit his deposit, and abandon the contract, however disadvantageous it may be.

Thus, on an application to the Court by the persons who opened the biddings for General Birch's estate (*g*), to for-

(*c*) Rigby *v.* M'Namara, 6 Ves. jun. 466; Earl of Macclesfield *v.* Blake, 8 Ves. jun. 214; Trefusis *v.* Clinton, 1 Ves. and Beam. 361.

(*d*) Earl of Macclesfield *v.* Blake, *ubi sup.*; Owen *v.* Foulks, 9 Ves. jun. 348; West *v.* Vincent, 12 Ves. jun. 6.

(*e*) See 2 Anstr. 657; *ex parte* Tilsley, 4 Madd. 227. n.

(*f*) Savile *v.* Savile, 1 P. Wms. 745.

(*g*) MS.; and see Sewell *v.* Johnson, Bunb. 76.

feit

feit their deposit, which was resisted by the creditors for whose benefit the estate was sold; the Court held the purchasers to their bargain, and would not permit them to rescind the contract, although they had given a price which was considered much beyond the value of the estate.

But where the purchaser has by *mistake* given an unreasonable price for the estate, the Court will in a proper case totally rescind the contract.

This equity was enforced in the case of Morshead *v.* Frederick (*h*), where it appeared that Smiths, the bankers, were tenants in possession of the house in question, for which *they* paid two rents, one a ground rent of 56*l.* to the defendant, and the other an improved rent of 210*l.* to a third person. The house was directed to be sold, under a decree; and the plaintiffs, by a broker, treated for the purchase of it, and employed him to value it. The broker had an interview with the attorney concerned in the sale, who stated, that the rent payable for the house was the 56*l.* and the broker valued the estate accordingly. A written agreement was not entered into, but the contract was approved of by the Master, and the money paid into the Bank. The purchasers then moved the Court to rescind the contract, on the ground of mistake, and the broker proved that the purchasers had not informed him of the rent of 210*l.* and that he was ignorant of the existence of it at the time he made his valuation: and the Court ordered the purchase-money to be repaid, and rescinded the contract. This, however, may be considered a strong case. It might be argued that the purchasers only equity was their own negligence.

Although the solicitor in the cause buy-in an estate merely to prevent a sale at an under-value, yet if he acted

(*h*) Ch. 20 Feb, 1816. MS. App. No. 10.

without

without authority, he will not be discharged from his purchase. Lord Eldon has said, that it would be a very wholesome rule to lay down, that the solicitor in the cause should have nothing to do with the sale; as the certain effect of a bidding by the solicitor in the cause is, that the sale is immediately chilled (*i*).

The same rule has been applied to assignees of a bankrupt, who, without authority, bought-in an estate ordered to be sold by the Court upon a petition of a mortgagee (*j*).

It may be observed, in this place, that if a bankrupt's estate be sold, and the purchaser pay a deposit, and then the commission is superseded, the Lord Chancellor will, upon petition, order the deposit to be returned, without driving the purchaser to file a bill (*k*).

(*i*) Nelthorpe *v.* Pennyman, 14 Ves. jun. 517.

(*j*) *Ex parte* Tomkins, Ch. 23d Aug. 1810, MS. App. No. 11.

(*k*) *Ex parte* Fector, 1 Buck, 426.

CHAPTER III.

OF PAROL AGREEMENTS AND PAROL EVIDENCE.

WITH a view to prevent many fraudulent practices which were commonly endeavoured to be upheld by perjury, it was enacted by the 29 Car. II. c. 3. usually called the statute of frauds, that (*l*) "all leases, estates, interests of freeholds, or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made and created by livery and seisin only, or by parol, and not put in writing by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the effect of leases or estates at will, any consideration for making any such parol leases or estates notwithstanding." But, nevertheless, leases not exceeding three years, whereupon the reserved rent should amount to two-thirds of the full improved, value, were excepted (*m*). The act then requires the assignment, grant, and surrender of existing interests to be made by writing (*n*); and then (*o*) enacts that "no action shall be brought, whereby to charge any person upon any agreement made upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them (1), unless the agreement, upon which such

(*l*) Sect. 1. (*m*) Sect. 2. (*n*) Sect. 3. (*o*) Sect. 4.

(1) "Or upon any agreement not to be performed within a year;" which clause does not extend to any agreement concerning lands. Hollis v. Edwards, 1 Vern. 159. It is quite clear, that an agreement for sale of lands must be in writing, although the contract is to be performed the next day. See Bracebridge v. Heald, 1 Barn. and Ald. 722.

action

action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

In treating of these legislative provisions, we may consider—1. What interests are within the statute:—2. What is a sufficient agreement:—3. What agreements will be enforced, although by parol;—and 4. In what cases parol evidence is admissible to vary or annul written instruments.

SECTION I.

Of the interests which are within the Statute.

IT was observed, in the case of Crosby *v.* Wadsworth (*p*), that collecting the meaning of the first section by aid derived from the language and terms of the second section, and the exception therein contained, the leases, &c. meant to be vacated by the first section, must be understood as *leases* of the *like* kind with those in the second section, but which conveyed *a larger interest* to the party *than for a term of three years*, and such, also, as were made *under a rent reserved thereupon*; and the Court, therefore, determined, that a sale of a standing crop of mowing grass, then growing, was not within the first section of the statute, because neither of the foregoing circumstances were to be found in the agreement, although, as the agreement conferred an exclusive right to the vesture of the land during a limited time, and for given purposes, it was, the court held, a *contract* or sale of *an interest in*, or at least an interest *concerning lands*.

It was not, however, necessary in the above case, to

(*p*) 6 East, 610.

decide

decide upon the precise construction of the first section, which seems in this respect to be co-extensive with the fourth, and, consequently, every interest which is within the fourth section is equally within the first, unless it come within the saving of the second section. The first and second sections appear to enact, that all interests actually created without writing, shall be void, unless in the case of a lease not exceeding three years, at nearly rack-rent, which exception must have been introduced for the convenience of mankind, and under an impression that such an interest would not be a sufficient temptation to induce men to commit perjury. Perhaps, therefore, the first section ought to extend to every possible interest, which is not within the exception in the second clause. If an estate, of whatever value, should be conveyed to a purchaser by livery of seisin, without writing, the act would avoid the estate, although the purchaser had paid his money. An actual lease for any given number of years, whether with or without rent, or any interest uncertain in point of duration, must, it should seem, equally fall within the provision of the first section, and cannot be sustained unless it come within the saving in the second section.

This, however, of itself would not have prevented all the evils which the act intended to avoid; for although actual estates could not be created, yet still parol *agreements* might have been entered into respecting the future creation of them. To remedy this mischief, the provision in the fourth section was inserted, which, it is conceived, relates not to contracts or sales of lands, &c. but to any *agreement* made upon any contract or sale of lands, &c. (I), and as agreements were more to be dreaded

(I) This appears to be the true reading of the statute, although this branch of the fourth section has been sometimes read as a distinct clause,

dreaded than contracts actually executed, no exception was inserted after the fourth section, similar to that which follows

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in which case the word *agreement* is dropped, and the clause runs thus, " no action to be brought upon any contract or sale of lands," &c. See Anon. 1 Ventr. 361, and 6 East, 611; but this clause seems to be governed by the preceding one in the same section, as to agreements made upon consideration of marriage. The statute says, no action to be brought, " to charge any person upon *any agreement made upon* any consideration of marriage, or upon [any agreement made upon] any contract or sale of lands," &c. The words between crotchets must, it is submitted, be implied. At the same time, there is certainly ground to contend, that the clause would have the same operation if not governed by the words in the preceding clause.

The statute seems to have been strangely misunderstood in the case of Charlewood v. Duke of Bedford, 1 Atk. 497, the report of which agrees with the Register's book. The object of the bill was to compel the performance in specie of a parol *agreement*, by the Duke's steward, to grant a lease. The case, therefore, fell within the fourth section, but the defendent pleaded the first, and to bring his case within it, stated the words of the statute, at the close of that section, to be " any *contract* for making such lease, or any former law to the contrary notwithstanding." The words really are " any *consideration*, &c." The framer of the plea must have adopted an error which has been sometimes entertained, that the first section relates to leases, and the fourth to sales, and this notion compelled him to alter the statute in the way he did, for he could not otherwise have brought his case within it. It is observable, that Lord C. B. Comyns, before whom the cause was heard, did not notice the mistake.

Lord Keeper North seems to have entertained the erroneous opinion above noticed; for, in a case which came before him on a parol agreement for a lease, he said that the difficulty that arose upon the act was that it makes void the estate, but does not say the agreement itself shal be void, and therefore, though the estate itself is void, yet, possibly, *the agreement may subsist*, so that a man may recover damages at law for the non-performance of it; and if so, he should not doubt to decree it in equity; and he actually sent the parties to law, in order to have the point decided, and for that purpose directed the defendant to admit the agreement. Hollis v. Edwards, 1 Vern. 159. The plaintiff was of course nonsuited

follows the first section, and consequently an *agreement* by parol, to create even such an interest as is excepted in the second section, would be merely void.

If this be the true construction of the act, it answers the purposes for which it was passed, and the question in all cases must be—is the interest in dispute actually created by the parties, or does the contract rest *in fieri*? If it be actually created, it is avoided by the first section, unless saved by the second. If it be not actually created, the agreement cannot be enforced by reason of the fourth section, whatever be the nature of it. But if the first section were to be restrained beyond the express provisions of the second section, then, although every parol *agreement* for any interest in lands would be void, yet many estates might still be actually raised by parol. The first section, however, seems to embrace *interests* of *every* description, whilst the exception relates only to *leases* of a *particular* description. One consequence of qualifying all the interests specified in the first section, in the manner proposed by the aid derived from the second section, would be, that an estate in fee might still, as formerly, be conveyed by livery of seisin without writing. But if the doctrine should even be confined to *leases*, yet it would open a considerable door to perjury. If the two requisites are to concur, to bring a lease within the first section; namely, a larger interest than that mentioned in the second section, and a reserved rent, then it should seem that a lease by parol for a thousand years without rent would be valid, notwithstanding the statute. If even one only of these requisites be essential, yet cases of importance may be taken out of the act; an estate, however

nonsuited in the action, and thereupon Lord North dismissed the bill. His impression before the trial must, it should seem, have been, that the first section related to leases, and the fourth only to sales; or at least, he must have thought that the fourth did not embrace *agreements* for leases.

valuable, may be claimed under a parol lease for a short of three years without rent. This is the ten to perjury which the statute intended to remove this mischief must necessarily follow, that if the swear to an *agreement* for such an interest, it will l in the statute; whereas, if they swear to an actual the case will be taken out of the statute.

The construction suggested in Crosby *v.* Wad of the first section of the statute, has since been at to be extended to the third section. It has been co that the leases mentioned in the third section, as re to be assigned by writing, must be intended suc as are required by the first and second sections of th to be created by deed or writing, viz. leases conv larger interest to the party than for a term of three but the Lord C. Baron, at *nisi prius*, ruled otherw appears to have held, that although an interest was by parol, by virtue of the second section, yet it ca assigned without a note in writing, by reason of t section (*q*). And even a tenancy from year to year, by parol, cannot be surrendered, although by consent, by parol (*r*).

But it has been decided, that a mere license within the first section of the statute of frauds. T decided in the case of Wood *v.* Lake (*s*). A paro

(*q*) See Botting *v.* Martin, 1 Camp. Ca. 13, but *qu.* whether the *agreement* or the *assignment* was by parol.

(*r*) Mollet *v.* Brayne, 2 Camp. Ca. 103. See Stone *v.* Whiting, 2 Stark. 235; Thomson *v.* Wilson, 2 Stark. 379; Phipps *v.* Sculthorpe, 1 Barn. and Ald. 50; Thomas *v.* Cook, 2 Stark. 408; 2 I Ald. 119.

(*s*) Say. 3; and see Brockwell, 8 East, 308 Inhabitants of Standon, 2 Selw. 461; Tayler *v.* Marsh. 551; 7 Taunt. 7 Inhabitants of Horndon and Selw. 562.

ment was entered into for liberty to stack coals on part of a close for seven years, and that during this term the person to whom it was granted should have the sole use of that part of the close upon which he was to have the liberty of stacking coals (I). Lee, C. J. and Dennison, held the agreement to be good. They relied upon the case of Webb and Paternoster (*t*), where they said it is laid down, that a grant of a license to stack hay upon land, does not amount to a lease of the land. As the agreement in the present case was only for an easement, and not for an interest in the land, it did not amount to a lease, and consequently it was not within the statute of frauds. Mr. Justice Forster concurred in opinion, that the agreement did not amount to a lease, but he inclined to be of opinion, that the words in the statute, any *uncertain interest in land*, did extend to this agrement; but Lee and Dennison thought those words related only to interests, which were uncertain as to the time of their duration. After time taken to consider, it was holden, that the agreement was good for the seven years.

The case referred to in Palmer, does not seem to bear out the judgment in the above case: the decision turned upon another point; but Montague and Haughton both thought, that that interest in that case was such as bound the land in the hands of a subsequent lessee. That case arose before the statute of frauds, and it would require a considerable stretch to make it apply to a case since the statute. No one will deny, that these cases are within the mischief against which the Legislature intended to guard. In Wood and Lake, the plaintiff was to have the sole use

(*t*) Palm. 71.

(1) Sayer is but an inaccurate reporter. It is not stated, but it should seem, that an annual payment was reserved in respect of the easement.

and no interest in the soil. The land was considered as a mere warehouse for the potatoes (*a*).

In a case decided in the same term in the Common Pleas, where growing turnips were sold, but no particular time was stated for their removal, nor did it appear what the degree of their maturity was, the Court, without adverting to these circumstances, held it to be a sale of an interest in land within the statute (*b*). It must be admitted to be very difficult to distinguish the cases.

In a still later case (*c*), where potatoes stated to be *then growing*, on three acres and a half of land, were sold by parol, at the rate of 25*l.* per acre, to be dug and carried away by the purchaser, but no time was appointed for that purpose, it was decided that the contract was not within the statute. Lord Ellenborough said, that if this had been a contract conferring an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it would be a contract for sale of an interest in or concerning lands, and would then fall unquestionably within the range of Crosby *v.* Wadsworth. But here is a contract for sale of potatoes at so much per acre; the potatoes are the subject matter of sale, and whether at the time of sale they were covered with earth in a field or in a box, still it was a sale of a mere chattel; it falls, therefore, within the case of Parker *v.* Staniland, and that disposes of the point on the statute of frauds.

If an entire agreement be made for the sale of real and personal estate, and the agreement as to the land be within the statute and void, it cannot be supported as to the personal property which was sold with it (*d*).

(*a*) Parker *v.* Staniland, 11 East, 362.

(*b*) Emerson *v.* Heelis, 2 Taunt. 38.

(*c*) Warwick *v.* Bruce, 2 Mau. and Selw. 205.

(*d*) Cooke *v.* Tombs, 2 Anst 420; Lea *v.* Barber, *ib.* 425, cited See Chater *v.* Beckett, 8 Term Rep 201; and see Neal *v.* Viney, 1 Camp. Ca. 471; Corder *v.* Drakeford, 3 Taunt. 382.

SECTION II.

Of the Form and Signature of the Agreement.

WE may now consider, first, what is a sufficient agreement; 2dly, what is a sufficient signature by the party or his agent; and 3dly, who will be deemed an agent lawfully authorized. And,

First then, it is to be observed, that the statute requires the writing to be signed only by the person to be charged; and therefore, if a bill be brought against a person who signed an agreement, he will be bound by it, although the other party did not sign it, as the agreement is signed by the person to be charged (*e*). This point has been established by the concurrent authority of the Lord Keeper North, Lord Keeper Wright, Lord Chancellor Hardwicke, Lord C. B. Smith, and Bathurst and Aston, Justices, when Lords Commissioners, Lord Chancellor Thurlow, Lord Chancellor Eldon, and Sir Wm. Grant. The Legislature has expressly said, that the agreement shall be binding *if signed by the party to be charged*; and as Lord Hardwicke has observed, the word *party* in the statute is not to be construed *party* as to a deed, but person

(*e*) Hatton *v.* Gray, 2 Cha. Ca. 164; Cotton *v.* Lee, 2 Bro. C. C. 564; Coleman *v.* Upcot, 5 Vin. Abr. 527. pl. 17; Buckhouse *v.* Crossby, 2 Eq. Ca. Abr. 32. pl. 44; Seton *v.* Slade, 7 Ves. jun. 265; Fowle *v.* Freeman, MS.; 9 Ves. jun. 355, S. C. See 1 Scho. and Lef. 20; and 11 Ves. jun. 592; Western *v.* Russell, 3 Ves. and Bea. 187; and see Wain *v.* Warlters, 5 East, 10; Egerton *v.* Matthews, 6 East, 307, which do not impeach this doctrine: see particularly 5 East, 16; and Allen *v.* Bennet, 3 Taunt. 169. As to Wain *v.* Warlters, see Stadt *v.* Lill, 9 East, 348; 1 Camp. Ca. 242; *Ex parte* Minet, 14 Ves. jun. 189; *Ex parte* Gardom, 15 Ves. jun. 286; Bateman *v.* Philips, 15 East, 272; Saunders *v.* Wakefield, 4 Barn. and Ald. 595.

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in general (*f*); but there have been instances in which the want of the signature to the agreement by the party seeking to enforce it, has been deemed a badge of fraud (*g*); but, perhaps, the transaction ought not to be viewed in that light, unless the other party called on the party who had not signed to execute it, in which case a refusal to sign might be held to operate as a repudiation of the contract (*h*).

In a late case, Lord C. J. Mansfield observed, that *in equity* a contract signed by one party would be enforced, *and it was not clear that it was different at law* (*i*). The rule in equity, it is conceived, is founded simply on the words of the statute, which must be equally binding on the courts of law. There is not an objection which can be made to the rule as applicable to an action at law which will not apply with equal force to a suit in equity. In a later case, accordingly, upon the 17th section, the same learned Judge observed, that every one knows it is the daily practice of the Court of Chancery to establish contracts signed by one person only, and yet a court of equity can no more dispense with the statute of frauds than a court of law can (*k*). Lord Eldon has observed, that equity has not upon these points gone farther than courts of law: what is the construction of the statute, what within the legal intent of it will amount to a signing, being the same questions in equity as at law. Upon that point, equity professing to follow the law, if a new question should arise, his Lordship said, that he would rather send a case to a court of law (*l*).

If a written agreement has been in part executed, it seems that an agreement subsequently entered into between

(*f*) See 3 Atk. 503.

(*g*) See O'Rourke v. Percival, 2 Ball and Beatty, 58.

(*h*) See 2 Ball and Beatty, 371.

(*i*) Bowen v. Morris, 2 Taunt. 374.

(*k*) Allen v. Bennet, 3 Taun. 176.

(*l*) 18 Ves. jun. 183.

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the parties, and reduced into writing, will bind them both, if signed by one of them (*m*).

A receipt for the purchase-money may constitute an agreement in writing within the statute (*n*); and it has frequently been decided, that a note or letter will be a sufficient agreement to take a case out of the statute (*o*); but every agreement must be stamped before it can be read (*p*); and, as this ought to be done, the Court will permit the cause to stand over to get the agreement stamped, and will assist either party in obtaining it for that purpose.

Thus, in Fowle *v.* Freeman (*q*), the agreement was sent by the vendor to his attorney, with a letter written at the bottom, directing him to prepare a technical agreement. The vendor afterwards refused to perform the contract, and the attorney would not deliver the agreement to the purchaser for the purpose of getting it stamped, contending, that it was a private letter to him; but the Court, on motion, ordered it to be delivered to the purchaser for that purpose.

But if the agreement is admitted by the answer so as to dispense with the necessity of proving it, the office-copy of the bill, or, if the defendant refuse to produce it, the record itself may be read in support of the plaintiff's case, and need not be stamped, nor can the fact of the agreement not being stamped be taken advantage of (*r*).

(*m*) Owen *v.* Davies, 1 Ves. 82.

(*n*) Coles *v.* Trecothick, 9 Ves. jun. 234; Blagden *v.* Bradbear, 12 Ves. jun. 466.

(*o*) Coleman *v.* Upcot, 5 Vin. Abr. 527. pl. 17; Buckhouse *v.* Crosby, 2 Eq. Ca. Abr. 32. pl. 44.

(*p*) Ford *v.* Compton; Hearne *v.* James, 2 Bro. C. C. 32, 309.

(*q*) Rolls, March 8, 1804, MS.; 9 Ves. jun. 351, S. C. but not reported as to this point. See *infra*, ch. 4. s. 3; Clarke *v.* Terrel, 1 Smith's Rep. 399; Coles *v.* Trecothick, 9 Ves. jun. 234.

(*r*) Huddleson *v.* Briscoe, 11 Ves. jun. 583.

If,

If, upon a treaty for sale of an estate, the owner write a letter to the person wishing to buy it, stating, that if he parts with the estate it shall be on such and such terms (specifying them); and such person, upon receipt of the letter, or within a reasonable time after the offer is made (*s*), accepts the terms mentioned in it, the owner will be compelled to perform the contract *in specie* (*t*).

So if a man (being in company) make offers of a bargain, and then write them down and sign them; and another person take them up and prefer his bill, that will be a sufficient agreement to take the case out of the statute (*u*).

But if it appear that, on being submitted to any person for acceptance, he had hastily snatched it up, had refused the owner a copy of it; or if, from other circumstances, fraud in procuring it may be inferred, it seems that in case of an action it will be left to the jury to say whether it was intended by the defendant, at first, to be a valid agreement on his part, or as only containing proposals in writing, subject to future revision (*w*): and if the aid of equity be sought, these circumstances would have equal weight with the Court. So in every case it must be considered, whether the note or correspondence import a concluded agreement: if it amount merely to treaty, it will not sustain an action or suit (*x*).

The note or writing must specify the terms of the agreement, for otherwise all the danger of perjury which the statute intended to guard against, would be let in.

Thus, upon the sale of nine houses which were in

(*s*) See 3 Mer. 454.

(*t*) Coleman *v.* Upcot, 5 Vin. Abr. 527. pl. 87. See Gaskarth *v.* Lord Lowther, 12 Ves. jun. 107.

(*u*) S. C. *per* Lord Chancellor.

(*w*) See Knight *v.* Crockford, 1 Esp. Ca. 189.

(*x*) Huddleston *v.* Briscoe, 11 Ves. jun. 583; Stratford *v.* Bosworth, 2 Ves. and Bea. 341.

mortgage,

mortgage, the vendor wrote a letter to the mortgagee to this effect: "Mr. Leonard, pray deliver my writings to the bearer, I having disposed of them. Am, &c." The vendor afterwards refused to perform the contract, and pleaded the statute of frauds to a bill filed by the purchaser for a specific performance, and the plea was allowed; because it ought to be such an agreement as specified the terms thereof, which this did not, though it was signed by the party; for this mentioned not the sum that was to be paid, nor the number of houses that were to be disposed of; whether all, or some, or how many; nor to whom they were to be disposed of; neither did this letter mention whether they were disposed of by way of sale or assignment of lease (*y*).

So where (*z*), upon a parol agreement, the vendor sent a letter to the purchaser, informing him that, at the time he contracted for the sale of the estate, the value of the timber was not known to him, and that he (the purchaser) should not have the estate, unless he would give a larger price; Lord Hardwicke held, that the letter could not be sufficient evidence of the agreement, the terms of it not being mentioned in the agreement itself.

So in a recent case, where an auctioneer's receipt for the deposit was attempted to be set up as an agreement, the Master of the Rolls rejected it, because it did not state the price to be paid for the estate; and it could not be collected from the amount of the deposit, as it did not appear what proportion it bore to the price (*a*).

(*y*) Seagood *v.* Meale, Prec. Cha. 560; Rose *v.* Cunynghame, 11 Ves. jun. 550; Card *v.* Jaffray, 2 Scho. and Lef. 374; Lord Ormond *v.* Anderson, 2 Ball and Beat. 363; and see Champion *v.* Plummer, 1 New Rep. 252; Hinde *v.* Whitehouse, 7 East, 558; Cooper *v.* Smith, 15 East, 103; all three cases on the 17th section.

(*z*) Clerk *v.* Wright, 1 Atk. 12; and see Clinan *v.* Cooke, 1 Scho. and Lef. 22.

(*a*) Blagden *v.* Bradbear, 12 Ves. jun. 466.

And

And here we may notice a case where an agreement was executed which referred to certain covenants, which had been read, contained in a described paper, which, in fact, contained the terms of the agreement. It appeared that all the covenants contained in that paper had not been read; and which of them had been read, and which had not, was the difficulty, which could only be solved by parol testimony; and Mr. Justice Buller held clearly, that such evidence was inadmissible (*b*), as it would introduce all the mischiefs, inconvenience, and uncertainty the statute was designed to prevent; and Lord Redesdale has since unqualifiedly approved of this decision (*c*).

Neither will a performance be compelled on a note or letter, if any error or omission, however trifling, appear in the essential terms of the agreement.

Thus in a case (*d*) (I) before Lord Hardwicke, the bill was brought to have a specific performance of an agreement, from letters which had passed between the parties. It appeared, that a certain number of years pur-

(*b*) Brodie *v.* St. Paul, 1 Ves. jun. 326; Higginson *v.* Clowes, 15 Ves. jun. 516; Lindsay *v.* Lynch, 2 Scho. and Lef. 1.

(*c*) 1 Scho. and Lef. 35; and see O'Herliby *v.* Hedges, *ibid.* 123.

(*d*) Lord Middleton *v.* Wilson, *et e contra*, Chan. 1741, MS.; S. C. Lofft, 801, cited. See 9 Ves. jun. 252; Stokes *v.* Moore, 1 Cox, 219; Popham *v.* Eyre, Lofft, 786; Gordon *v.* Trevalyan, 1 Price, 64; Blore *v.* Sutton, 3 Mer. 237.

(1) The case is in Reg. Lib. 1741, fo. 260, by the name of Lord Middleton *v.* Eyre. The estate was sold by an agent to Dr. Wilson, by parol, and the parties appear to have bound themselves by letters, the particulars of which, however, do not appear in the Register's book. The parties beneficially interested, afterwards sold the estate for a greater price to Lord Middleton, who filed a bill for a specific performance of the agreement, and Dr. Wilson filed a cross-bill. The cross-bill was dismissed with costs, and in the original cause a specific performance was decreed. The point in the text is not stated in the Register's book.

chase

chase was to be given for the land, but it could not be ascertained whether the rents upon a few cow-gates were 5*s.* or 1*s.*; and although there was no other doubt, Lord Hardwicke held, that such an agreement could not be carried into execution. He said, that in these cases it ought to be considered, whether at law the party could recover damages; for if he could not, the Court ought not to carry such agreements into execution.

Lord C. J. Mansfield lately observed, that there had been many cases in Chancery, some of which he thought had been carried too far, where the Court had picked out a contract from letters, in which the parties never certainly contemplated that a complete contract was contained (*e*).

But although a letter do not in itself contain the whole agreement, yet if it *actually refer* to a writing that does, that will be sufficient, although such writing is not signed.

Thus in a case where an estate was advertised to be let for three lives, or thirty-one years, and an agreement was entered into for a lease, in which the term for which it was to be granted was omitted; Lord Redesdale held, *that if the agreement had referred to the advertisement*, parol evidence might have been admitted to show what was the thing (namely the advertisement) so referred to, for then it would be an agreement to grant for so much time as was expressed in the advertisement; and then the identity of the advertisement might be proved by parol evidence (*f*). And the Master of the Rolls, in a late case, expressed his opinion, that a receipt which did not contain the terms

(*e*) 3 Taunt. 172.

(*f*) See Clinan *v.* Cooke, 1 Scho. and Lef. 22; and see Cass *v.* Waterhouse, Prec. Cha. 29; Hinde *v.* Whitehouse, 7 East, 558; Feoffees of Herriot's Hospital *v.* Gibson, 2 Dow. 301.

of

of the agreement, might have been enforced as an agreement, had it referred to the conditions of sale, which would have entitled the Court to look at them for the terms (*g*).

So an agreement not containing the name of the buyer may be made out by connecting it with a letter from the buyer on the subject (*h*).

In a case (*i*) where an agreement for sale was reduced into writing, but not signed, owing to the vendor having failed in an appointment for that purpose; the vendee's agent wrote to urge the signing of the agreement; and the vendor wrote in answer a letter, in which, after stating his having been from home, he said, "his word should always be as good as any security he could give." And this was held by Lord Thurlow to take the case out of the statute, as clearly referring to the written instrument. The ground of this decision was, that the vendor had agreed, by writing, to sign the agreement. If he had said he never would sign it, he could not have been bound; but if he said he never would sign it, but would make it as good as if he did, it would be a promise to perform it; if he said he would never sign it, because he would not hamper himself by an agreement, it would be too perverse to be admitted (*k*). It appears, however, that Lord Thurlow was diffident of his opinion in this case; and Lord Redesdale has declared, that he had often discussed the case, and he could never bring his mind to

(*g*) Blagden *v.* Bradbear, 12 Ves. jun. 466; and see Shippey *v.* Derrison, 5 Esp. Ca. 190; Hinde *v.* Whitehouse, 7 East, 558.

(*h*) Allen *v.* Bennet, 3 Taunt. 169; Western *v.* Russell, 3 Ves. and Bea. 187.

(*i*) Tawney *v.* Crowther, 3 Bro. C. C. 161, 318; and see Forster *v.* Hale, 3 Ves. jun. 696; Cooke *v.* Tombs, 2 Anstr. 420; Saunderson *v.* Jackson, 2 Bos. and Pull. 238, and 9 Ves. jun. 250.

(*k*) *Per* Lord Thurlow, 3 Bro. C. C. 320.

agree

agree with Lord Thurlow's decision, because he (Lord Redesdale) thought the true meaning of the agreement was, "I will not bind myself, but you shall rely on my word (*l*)."

But in these cases there must be a clear reference to the particular paper, so as to prevent the possibility of one paper being substituted for another (*m*).

And if the agreement is defective, and the letter refers to a different contract from that proved by the opposite party, the letter cannot be adduced as evidence of the contract set up. The letter must be taken altogether, and if it falsify the contract proved by the parol testimony, it will not take the case out of the statute (*n*).

As we shall hereafter see, an auctioneer is an agent lawfully authorized for the vendor and purchaser within the statute. Upon the sale of estates by auction, a deposit is almost universally paid, for which the auctioneer gives a receipt, referring to the particulars, or indorsed on them, and amounting, in most cases, to a valid agreement on the part of the vendor within the statute (*o*). And it seems that a bill of sale, or entry by the auctioneer, of the account of the sale, in his books, stating the name of the owner, the person to whom the estate is sold, and the price it fetched, would be deemed a sufficient memorandum of the agreement to satisfy the statute (*p*). This, however, it clearly would not, unless it either contained the conditions of the sale and the particulars of the pro-

(*l*) See 1 Scho. and Lef. 34.

(*m*) Boydell *v.* Drummond, 11 East, 142.

(*n*) Cooper *v.* Smith, 15 East, 103.

(*o*) See Blagden *v.* Bradbear, 12 Ves. jun. 466, *et supra*.

(*p*) See Emmerson *v.* Heelis, 2 Taunt. 38, *et infra*; but see Mussell *v.* Cooke, Prec. Cha. 533; Charlewood *v.* Duke of Bedford, 1 Atk. 497; Ramsbottom *v.* Mortley, 2 Mau. and Selw. 445.

perty,

perty, or actually referred to them, so as to enable t Court to look at them (*q*).

A note or letter, written by the vendor to any thi person, containing directions to carry the agreement in execution, will, subject to the before-mentioned rules, a sufficient agreement to take a case out of the statute (r This was laid down by Lord Hardwicke, who said, th it had been deemed to be a signing within the statu and agreeable to the provision of it. And the poi was expressly determined, in the year 1719, by the Co of Exchequer (*s*).—Upon an agreement for an assig ment of a lease, the owner sent a letter, specifying t agreement, to a scrivener, with directions to draw an a signment pursuant to the agreement; and Chief Bar Bury, Baron Price, and Baron Page, were of opinio that the letter was a writing within the statute of fraud And the same doctrine appears to apply to a letter writt by a purchaser (*t*).

In Kennedy *v.* Lee (*u*), Lord Eldon observed, that order to form a contract by letter, he apprehended nothi more was necessary than this, that when one man mak an offer to another to sell for so much, and the oth closes with the terms of his offer, there must be a fair u derstanding on the part of each as to what is to be t purchase-money and how it is to be paid, and also reasonable description of the subject of the bargain. must be understood, however, that the party seeking t specific performance of such an agreement, is bound

(*q*) Blagden *v.* Bradbear, *ubi sup.* Hinde *v.* Whitehouse, 7 East, 558.

(*r*) Welford *v.* Beazely, 3 Atk. 503. See Seagood *v.* Meale, Prec. Cha. 560; Cooke *v.* Tombs, 2 Anstr. 420.

(*s*) Smith *v.* Watson, Bunb. 5 S. C. MS.

(*t*) Rose *v.* Cunynghame, 11 V jun. 550.

(*u*) 3 Mer. 441

fi

find in the correspondence, not merely a treaty, still less a proposal, for an agreement, but a treaty, with reference to which, mutual consent can be clearly demonstrated, or a proposal met by that sort of acceptance, which makes it no longer the act of one party but of both. It follows, that he is bound to point out to the Court, upon the face of the correspondence, a clear description of the subject matter relative to which the contract was in fact made and entered into. His Lordship added, that he did not mean (because the cases which had been decided would not bear him out in going so far) that he was to see that both parties really meant the same precise thing, but only that both actually gave their assent to that proposition which, be it what it may, *de facto* arises out of the terms of the correspondence. The same construction must be put upon a letter, or a series of letters, that would be applied to the case of a formal instrument; the only difference between them being, that a letter or a correspondence is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise conclusion.

In Cooth *v.* Jackson (*w*) Lord Rosslyn put the case of a bond of reference to a surveyor, the price to depend upon his valuation, only to ascertain how much an acre the purchaser was to pay for the land. And his Lordship said, he should conceive that not to be within the statute.

But rent-rolls, particulars of estates, abstracts, &c. delivered by the vendor on the treaty for sale, will not be considered as an agreement, although signed by him, and containing the particulars of the agreement; nor will letters written, or representations made by him, to creditors, concerning the sale, receive that construction.

Thus, in a case (*x*) where *A* agreed by parol with *B*

(*w*) 6 Ves. jun. 17. (*x*) Whaley *v.* Bagenel, 6 Bro. P.C. 45.

for the purchase of lands; shortly afterwards, a rent-roll was delivered to *A*, which *B* dated and altered in his own hand-writing; and it was intituled, "Land agreed to be sold by *B* to *A*, from, &c. at twenty-one years purchase, for the clear yearly rent." An abstract of the title, also stating the contract, was delivered by *A*'s agent, and also further particulars and papers at different times. *B* also wrote to several of his creditors, informing them that he had agreed with *A* for the sale of the estate, at twenty-one years purchase; referred tenants to *A*, as owner of the estate; and set up the contract as a bar to an *elegit*. *B* afterwards refused to perform the agreement; and to a bill filed for a specific performance, pleaded the statute of frauds, and the plea was allowed.

So, in a later case (*y*), upon a bill filed by a vendee, for a specific performance of a parol agreement for sale of lands, it appeared that the vendor gave the purchaser a particular of the property to be sold, with the terms and conditions, all in his own hand-writing, and signed by him; and it was afterwards delivered, by agreement of both parties, to an attorney, to prepare the conveyance from, who prepared a draft, and brought it to the parties, and they read over and approved of it, and agreed to execute the same, whenever a fair copy could be written out. The defendant, however, refused to fulfil his part of the agreement, and pleaded the statute of frauds to the bill; and, as the particular was delivered at the outset of the treaty, no agreement being then made, the Court held it could only be delivered as a list or catalogue of the matters for sale, to enable the purchaser to form a proper estimate of their value; that the signing the particular could have no other effect than to give it

(*y*) Cooke v. Tombs, 2 Anst. 420; and see Cass v. Waterhouse, Prec. Cha. 29.

authenticity,

authenticity, as a true list of the items then offered for sale; and that the subsequent acts could not affect the original nature of the particular, and turn it into an agreement.

Although an agreement be reduced into writing, by a person present at the making of it, yet if the parties do not sign it, they will not be bound by it (*z*).

If an agreement contain all the terms, the sending of it, as instructions to a person to prepare a proper agreement, will not be deemed an intention to extend the agreement, but merely to reduce it into technical language.

Thus, in Fowle *v.* Freeman (*a*), after some treaty for the purchase of an estate, certain terms were agreed upon and written down by Freeman the vendor, and afterwards written out by him, as an agreement; viz.—" March 12th, 1803. I agree to sell to Mr. Fowle, my estate, &c. for the sum of 27,000*l.* upon the following conditions, &c." (stating them). Freeman signed this agreement, and read it to Fowle, who approved of it. Freeman then underwrote a letter to his solicitor in town to the following effect:—" Sir, please to prepare a proper agreement for Mr. Fowle and me to sign, and send it to me at this place. You will also deliver to Mr. Everett," the gentleman who carried the letter to town, " an abstract of my title-deeds for his examination. As soon as the title-deeds are approved of, he engages to lend me 5,000*l.* till Michaelmas next." The letter was signed and dated by him, and was delivered by Mr. Everett to the solicitor in town. Freeman afterwards refused to perform the agreement; and, to a bill filed by Fowle for a specific per-

(*z*) Gunter *v.* Halsey, Ambl. 586; Whitchurch *v.* Bevis, 2 Bro. C. C. 559; Ramsbottom *v.* Tunbridge, Ramsbottom *v.* Mortley, 2 Mau. and Selw. 434, 445.

(*a*) Rolls, 8th March, 1804, MS.; 9 Ves. jun. 351, S. C.

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formance, pleaded the statute of frauds. The Master of the Rolls held, that if the attorney had prepared an agreement, according to the letter, Freeman would have been compelled to execute it, and the attorney could not alter the agreement itself in any one respect. A letter or proposal will do, although the party repents; and many decrees have been founded merely on letters. If this objection were to hold, he said it might be contended, that if an agreement contained a reference to title-deeds to be formally executed, it would not do; and his Honor decreed a specific performance.

II. We are next to consider what is a sufficient signature by the party or his agent. Before the statute of frauds, an agreement, although reduced into writing and signed, was not considered as a written agreement unless sealed; but it was regarded as a parol agreement, and the writing as evidence of it (*b*).

It has been justly said, that the same rule prevails since the statute of frauds (*c*); for the law of England recognizes only two kinds of contracts, viz. specialties and parol agreements, which last include all writings not under seal, as well as verbal agreements not reduced into writing (*d*). In the case of Wheeler *v.* Newton (*e*), the agreement not having been sealed, seems to have been insisted upon, as leaving the case within the statute: and Lord Commissioner Rawlinson said, that agreements in writing, though not sealed, *had some better countenance*

(*b*) See 1 Cha. Ca. 85.

(*c*) See Marquis of Normanby *v.* Duke of Devonshire, 2 Freem. 216.

(*d*) Rann *v.* Hughes, 7 Term Rep. 350, n.; S. C. MS. *in tot. verbis.*

(*e*) Prec. Cha. 16.

since

since the statute of frauds and perjuries than they had before (I).

This doubt must have arisen from the common-law doctrine before noticed, that an agreement not under seal is simply a parol agreement, and the writing evidence of it; but there certainly was no foundation for the doubt: the statute makes signing only requisite to the validity of a written agreement, and it is now clearly established, that sealing is not necessary; and if a man be in the habit of printing or stamping instead of writing his name, he would be considered to have signed by his printed name (*f*).

The signature required by the statute, is to have the effect of giving authenticity to the *whole* instrument; and where the name is inserted, in such a manner as to have that effect, it does not much signify in what part of the instrument it is to be found (*g*).

Therefore, the signing the same at the beginning of the agreement, will take it out of the statute; as if a person write the agreement himself, and begin, "*A B* agrees to sell, &c." and this is only in analogy to the case of a testator writing his name at the beginning of his will, which is equivalent to his signing it; and yet the statute expressly requires a signature (*h*).

(*f*) Saunderson *v.* Jackson, 2 Bos. and Pull. 238; Schneider *v.* Norris, 2 Mau. and Selw. 286.

(*g*) *Vide* Stokes *v.* Moore, stated *infra*; Allen *v.* Bennet, 3 Taunt. 169.

(*h*) Knight *v.* Crockford, 1 Esp. Ca. 189; and see 1 Bro. C. C. 410; 3 Esp. Ca. 182; 9 Ves. jun. 248; and Saunderson *v.* Jackson, 2 Bos. and Pull. 238; see Cooper *v.* Smith, 15 East, 103; Morison *v.* Turnour, 18 Ves. jun. 175.

(I) In Dawson *v.* Ellis, 1 Jac. and Walk. 524, the Court was of opinion, that if *A* contract verbally to sell to *B*, and afterwards contract by writing to sell to *C*, and then convey the estate to *B*, he (*B*) is not liable to perform the contract with *C*, although he had notice of it before the conveyance.

And such a signature will be sufficient, although a place be left for a signature at the bottom of the instrument (*i*) (I); and yet, as Lord Eldon has observed, it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete till it was further signed.

And if the party know the contents of the agreement, a subscription, as a witness, is a sufficient signing (*k*).

So, where a clerk of an agent, duly authorized to treat for a principal, signed an agreement thus, "Witness *A B*, for *C D*, agent to the seller," it was holden to be out of the statute (*l*). And it is sufficient, it seems, if the initials of the name are set down (*m*).

But a letter without a signature of the name in some way, cannot be brought within the statute. Therefore, a letter written by a mother to her son, beginning "My dear Nicholas," and ending "your affectionate mother," with a full direction, containing the son's name and

(*i*) Saunderson *v.* Jackson, *ubi sup.*

(*k*) Welford *v.* Beazely, 3 Atk. 503. See 9 Ves. jun. 251.

(*l*) Coles *v.* Trecothick, 9 Ves. jun. 234; 1 Smith's Rep. 233; but see Blore *v.* Sutton, 3 Mer. 237.

(*m*) Phillimore *v.* Barry, 1 Camp. Ca. 513.

(I) This question frequently arises upon wills of personalty. Walker *v.* Walker, decided by the Court of Delegates, 19th Feb. 1805. Ann Walker made her will, comprising real and personal estate, which she signed and sealed, and then folded up with this indorsement; "I signed and sealed my will to have it ready to be witnessed the first opportunity I could get proper persons for it." The usual attestation clause was added, but not signed by any witness. At her death the instrument was found in her drawer in the envelope, and it was determined not to be a good will of the personal property, on the ground, that something appearing by the attestation clause to be intended to be done, the instrument was not complete as the last will of the testatrix. 1 Mer. 503.

place

place of residence, is not a good agreement within the statute (*n*).

And it seems that the signature of the purchaser by himself or his agent, on the back of the particulars and conditions of sale, with the sum opposite to it, is a sufficient compliance with the directions of the act (*o*).

And, as we have seen, an agreement not signed, may be supported by a signature to a writing referring to the agreement.

But the mere altering the draft of the conveyance will not take a case out of the statute (*p*); neither will the writing over of the whole draft by the defendant with his own hand be sufficient, as there must be a signature (*q*). To this rule we may, perhaps, refer the case of Stokes *v.* Moore (*r*); where the defendant wrote instructions for a lease to the plaintiff, in these words; viz. "The lease renewed; Mrs. Stokes to pay the King's tax; also to pay Moore 24*l.* a year, half yearly; Mrs. Stokes to keep the house in good tenantable repair, &c." Stokes the lessee filed a bill for a specific performance, and the Court of Exchequer held it not to be a sufficient signing, to take the agreement out of the statute; although it was not necessary to decide the point.

Lord Eldon is reported to have said, that he had some doubt of the doctrine in this case (*s*).

(*n*) Selby *v.* Selby, Rolls, 1817, MS.

(*o*) *Vide supra*, and Hodgson *v.* Le Bret, Camp. N. P. 233; Phillimore *v.* Barry, *ib.* 513; cases on the 17th sect. Emmerson *v.* Heelis, 2 Taunt. 38.

(*p*) Hawkins *v.* Holmes, 1 P. Wms. 776, which overruled Lowther *v.* Carril, 1 Vern. 221. See Shippey *v.* Derrison, 5 Esp. Ca. 190.

(*q*) Ithel *v.* Potter, 1 P. Wms. 771, cited.

(*r*) Stokes *v.* Moore, 1 Cox, 219; Cox's n. to 1 P. Wms. 771. See 1 Smith's Rep. 244.

(*s*) And see Emmerson *v.* Heelis, 2 Taunt. 38, and observe how the purchaser's name was signed there. See also Morison *v.* Turnour, 18 Ves. jun. 175; Western *v.* Russell, 3 Ves. and Bea. 187.

Mr.

Mr. Baron Eyre appears to have put it on its true grounds. He said, that the signature is to have the effect of giving authenticity to the whole instrument, and if the name is inserted, *so as to have that effect*, he did not think it signified much in what part of the instrument it was to be found: it was, perhaps, difficult, except in the case of a letter with a postscript, to find an instance where a name inserted in the middle of a writing can well have that effect; and then the name being generally found in a particular place, by the common usage of mankind, it may very *probably* [qu. properly] have the effect of a legal signature, and extend to the whole; but he did not understand how a name inserted in the body of an instrument, and *applicable to particular purposes*, could amount to such an authentication as is required by the statute.

III. In considering what signature satisfies the requisition of the statute, we have necessarily adverted to signatures by agents; and it will now be proper to consider who will be deemed an agent lawfully authorized within the statute of frauds, to sign an agreement for the sale or purchase of an estate.

In the first and third sections of the statute of frauds, which relate to leases, &c, the writing is required to be signed by the parties making it, or their agent *authorized by writing*. This latter requisite is omitted in the fourth and seventeenth sections of the statute (I). The Legislature seems to have taken this distinction, that where an interest

(I) In a note to Mr. East's 7th vol. p. 565, it is said, that by the fourth section, to affect lands, the note must be signed by an agent thereunto lawfully authorized *by writing*, &c. which words, "by writing," are omitted in the seventeenth section, touching the sale of goods. This mistake must be attributed to the hurry of the press, for the agent is in neither section required to be authorized by writing.

is

nded to be actually passed, the agent must be autho- by writing; but that where a mere agreement is en- into, the agent need not be constituted by writing; herefore an agent may be authorized by parol to treat buy an estate, although the contract itself must be ing (*t*). It is, however, in all cases, highly desirable he agent should have a written authority. Where merely a parol authority, it must frequently be lt to prove the existence and extent of it (*u*); al- h it may be observed that his testimony will be re- l with great caution against his signature as agent. ever, at the time of signing, he make a declaration has no authority, his principal will not be bound (*x*). t although an agent is authorized to sell at a parti- price, yet it seems that his clerk cannot contract ut a special authority or agreement for that pur- (*y*); which, however, need not be in writing.

principal may revoke the authority of the agent time before an agreement is executed according to tute, although the agent has previously agreed ver- o sell the property (*z*); and an intended purchaser a like manner revoke his authority to his agent to ase (*a*).

Valler v. Hendon, 5 Vin. 24. pl. 45; Wedderburne v. the Exchequer, T.T. 1775, Ides. 427, cited; Rucker meyer, 1 Esp. Ca. 105; . Trecothick, 9 Ves. jun. Smith's Rep. 233; Barry Barrymore, 1 Schoales and s Rep. 28, cited; Clinan v. ls. 22; Emmerson v. Hee- Saint. 38.

Hortlock v. Buller, 10 Ves. 12. See Daniel v. Adams, 495; Charlewood v. the Duke of Bedford, 1 Atk. 497; and see 5 Vin. Abr. 522. pl. 35; Wyatt v. Allen, MS. App. No. 9.

(*x*) Howard v. Braithwaite, 1 Ves. and Beam. 202.

(*y*) Coles v. Trecothick, 9 Ves. jun. 234.

(*z*) See Farmer v. Robinson, 2 Campb. 339, n.

(*a*) As to sales by auction, see Blagden v. Bradbear, 12 Ves. jun. 467; Mason v. Armitage, 13 Ves. jun. 25.

The

The statute requires every agreement as to lands, or some memorandum or note thereof, to be in writing, and signed *by the party to be charged*, or some other person *thereunto*, (that is, to the signing thereof) (*b*) by *him* authorized. And that as to goods, some note or memorandum in writing of the bargain, shall be made and signed by the *parties* to be charged by such contracts, or their *agents*, thereunto authorized. And yet it has been decided, that the signature of the party to be charged by himself or agent is sufficient, even in a contract for goods (*c*), although the other party has not signed, and consequently is not bound; so that there appears to be no difference between the two clauses of the statute, in regard to the appointment and power of an agent.

It has, however, been repeatedly decided, that an auctioneer is the agent of both parties upon a sale of goods, so as to be enabled to bind them both under the statute (*d*); whilst, on the contrary, it has been decided, and lately seemed to be the prevailing opinion, that the auctioneer is not the agent of the purchaser upon a sale by auction of *estates*, so as to be authorized to bind him by setting down in writting the terms of the contract (*e*); but in a late case, upon the sale of an interest within the fourth section, the Court of Common Pleas held, that the

(*b*) See 1 Ves. and Beam, 207.

(*c*) Allen *v.* Bennet, 3 Taunt. 169.

(*d*) Simon *v.* Motivos, 3 Burr. 1921; Bull. Ni. Pri. 280; 1 Blackst. 599; Rucker *v.* Cammeyer, 1 Esp. Ca. 105; Hinde *v.* Whitehouse, 7 East, 558; and see Rondeau *v.* Wyatt, 2 H. Blackst. 67; and 1 Ca. and Opin. 142, 143; Phillimore *v.* Barry, 1 Camp. Ca. 513; and see the observations in the 2d edit. of this work, p. 57—64.

(*e*) Stansfield *v.* Johnson, 1 Esp. Ca. 101; Walker *v.* Constable, 2 Esp. Ca. 659; 1 Bos. and Pull. 306; Buckmaster *v.* Harrop, 7 Ves. jun. 341; 13 Ves. jun. 456; Coles *v.* Trecothick, 9 Ves. jun. 234; 1 Smith, 257. See 13 Ves. jun. 473.

auctioneer

uctioneer was an agent for the purchaser, even upon a ale of estates. Lord C. J. Mansfield, in delivering judgent, asked, by what authority does he write down the urchaser's name? By the authority of the purchaser. hese persons bid, and announce their biddings loudly, nd particularly enough to be heard by the auctioneer. For hat purpose do they do this? That he may write down heir names opposite to the lots; therefore he writes the ame by the authority of the purchaser, and he is an agent or the purchaser (*f*). In a later case (*g*), the Court of ommon Pleas adhered to their former decision, and they onsidered the signature by the auctioneer of the purchaer's name alone, sufficient, although he was only an agent, o bind the principal; and the conditions expressly required that the highest bidder should sign a contract for he purchase. The principal, however, was present, and id not object to the signature by the auctioneer until fter it was made. The action in this case was brought or the auction duty. Upon a bill filed by the seller for a pecific performance, the Master of the Rolls decreed it, ollowing the decisions in the Common Pleas, although is own opinion was, that an auctioneer is not the agent of he purchaser (*h*). The rule, therefore, may now be laid down generally, that an auctioneer is an agent lawfully authorized by the purchaser. It was always clear, that an auctioneer, appointed by a vendor, was a good agent for *him* within the statute (*i*).

And although a purchaser bid by an agent, yet the auctioneer is still duly authorized to sign the agreement (*k*).

(*f*) Emmerson *v.* Heelis, 2 Taunt. 38. See 1 Cas. and Opin. 142, 143.

(*g*) White *v.* Procter, 4 Taunt. 209.

(*h*) Kemys *v.* Proctor, 3 Ves. and Bea. 57; 1 Jac. and Walk. 350.

(*i*) *Vide supra.*

(*k*) Emmerson *v.* Heelis, 2 Taun. 38; White *v.* Proctor, 4 Taunt. 209.

It

It seems that the agent must be a third person, and that neither of the contracting parties can be the agent of the other (*l*). It would be difficult, however, to maintain this proposition, where either party has an express authority from the other to sign the agreement on his behalf.

SECTION III.

Of Parol Agreements not within the Statute.

I. We have seen what is considered a sufficient agreement to take a case out of the statute; but there are cases in which the performance of an agreement will be compelled, although the terms of it are not reduced into writing; for though the statute provided that no agreement should be good, unless signed by the party to be bound thereby, or some person authorized by him, yet on all the questions upon that statute, the purport of making it has been considered, viz. to prevent frauds and perjuries; and where there has appeared to be no danger of either, the courts have endeavoured to take the case out of the statute (*m*).

Upon this ground it was that in the case of Simon *v.* Motivos, Lord Mansfield and Mr. Justice Wilmot expressed a clear opinion, in which Mr. Justice Yates was inclined to concur, that sales by auction were not within the statute, because the solemnity of that kind of sale precludes all perjury as to the fact itself of sale. The case, however, which arose upon the sale of goods, was determined upon the ground of the constructive agency of the

(*l*) See Wright *v.* Dannah, 2 Camp. 203.

(*m*) See 1 Ves. 221.

auctioneer,

auctioneer (*n*), who had set down in writing the name of the purchaser, &c. (*o*).

Succeeding judges have entertained a different opinion on the great question, whether sales by auction are within the statute of frauds; and it has accordingly been since frequently decided, that sales by auction of estates are within the statute (*p*). And although the point has never been decided, yet, from the present temper of the courts, it seems probable that it will be determined, that sales by auction, even of goods, are within the statute.

But on the ground that there is no danger in such a transaction of either fraud or perjury, a sale before a Master, under the decree of a court of equity, will be carried into execution, although the purchaser did not subscribe any agreement. The judgment of the Court, in confirming the purchase, takes it out of the statute (*q*).

So if, under a reference to a Master, an agreement be made to lay out trust-money in the purchase of particular lands, and the Master make his report accordingly, and the report be confirmed without any opposition by the owner of the estate, the purchase will be carried into a specific execution, although no agreement was signed by the vendor. The sale is a judicial sale, which takes it entirely out of the statute (*r*).

(*n*) *Vide supra.*

(*o*) 3 Burr. 1921, Bull. Ni. Pri. 280; 1 Blackst. 599.

(*p*) Stansfield *v.* Johnson, 1 Esp. Ca. 101; Walker *v.* Constable, 2 Esp. Ca. 659; 1 Bos. and Pull. 306; Buckmaster *v.* Harrop, 7 Ves. jun. 341, affirmed on appeal, Dec. 1806; Blagden *v.* Bradbear, 12 Ves. jun. 466; and see Coles *v.* Trecothick, 9 Ves. jun. 249; Hinde *v.* Whitehouse, 7 East, 558; Mason *v.* Armitage, 13 Ves. jun. 25; Higginson *v.* Clowes, 15 Ves. jun. 516. The case of Symonds *v.* Ball, 8 Term Rep. 151, turned on the particular provisions of another act of parliament.

(*q*) Attorney General *v.* Day, 1 Ves. 218; and see 12 Ves. jun. 472.

(*r*) S. C.

II. It

II. It has been repeatedly determined in equity (*s*), that if a bill be brought for the execution of an agreement not in writing, nor so stated in the bill, yet if the defendant put in his answer, and confess the agreement, that takes the case entirely out of the mischief intended to be prevented by the statute; and there being no danger of perjury, the Court would decree it; and if the defendant should die, upon a bill of revivor against his heir, the same decree would be made as if the ancestor were living, the principle going throughout, and equally binding the representatives (*t*).

Lord Chancellor Bathurst, however, held that an agreement, not in part performed, could not be carried into execution, although confessed by the answer. In Eyre *v.* Popham (*u*), addressing himself to Mr. Ambler, he asked if there was any case in which there had been a decree founded upon confession generally without a part performed? and Mr. Ambler replied, that in some of the cases, the Chancellor had been mentioned to have said it, but he never found a decree. In giving judgment, his Lordship is reported to have said, "This is not an agreement in writing, upon the statute of frauds; but the question is, whether it is an agreement which so appears as that the Court will decree a performance. It has been said, that it is a known rule in this Court, that where an agreement appears confessed, the Court will decree a performance, though no part has been performed: some dictums there have been, but Mr. Ambler confesses that he

(*s*) Croyston *v.* Banes, Prec. Cha. 208; and see 1 Ves. 221. 441; Ambl. 586; Mose. 370; and Symondson *v.* Tweed, Prec. Cha. 374; Gilb. Eq. Rep. 35; Wanby *v.* Sawbridge, 1 Bro. C. C. 414, cited.

(*t*) *Per* Lord Hardwicke, see 1 Ves. 221.

(*u*) Lofft, 808, 809; and see Eyre *v.* Iveson, 2 Bro. C. C. 563, cited.

has

has found no decree—that where the substance clearly appears, though in parol, without any part performed, the Court will decree an agreement to be executed. I think it cannot be possible; this Court cannot repeal the statute of frauds, or any statute. The king has no such power, by the constitution, entrusted in him; and therefore there can be no such power in his delegates. The only case I know that takes a contract out of the statute is of fraud, and the jurisdiction of this Court is principally intended to prevent fraud and deceit. Where a party has given ground to another to think he had a title secured, the Court will secure it to him. The ground, therefore, in making and refusing decrees, has been fraud. It can never be laid down by the Court, that where the substance appears it shall be executed. It would not have been so at common law."

In the discussion of the foregoing case, neither the bar nor the court appear to have been aware of a case before Lord Chancellor Macclesfield (*x*), in which the defendant having pleaded the statute of frauds to a bill seeking a specific performance of a parol agreement, his Lordship said, the plea was proper, but then the defendant ought, by answer, to deny the agreement; for if she confessed the agreement, the Court would decree a performance, *notwithstanding the statute*; for that such confession would not be looked upon as perjury, or intended to be prevented by the statute. And he therefore confirmed an order, that the plea should stand for an answer, with liberty for the plaintiff to except thereto, and that the benefit thereof should be saved to the defendant until the hearing of the

(*x*) Child *v.* Godolphin, 1 Dick. 39; 2 Bro. C. C. 566, cited; and see Hartley *v.* Wilkinson, Irish Term Rep. 357.

cause. And Lord Hardwicke appears to have entertained the same opinion (*y*).

In Whitchurch *v.* Bevis (*z*), Lord Thurlow at first expressed his opinion, that the only effect of the statute was, that an agreement should not be proved *aliunde*. No evidence that could be given would sustain the suit if the defendant answered and denied the agreement. In this case the agreement was confessed, but the statute was pleaded, and it was ultimately decided on its own particular circumstances. Lord Thurlow said, he meant to determine upon the ground of this particular case; because it might become to be more seriously considered what sort of a verbal agreement, notwithstanding the plea of the statute of frauds, might be sustained, as being confessed by the answer, so as the Court would carry it into execution. His Lordship added, that he was prepared to say, if there were general instructions for an agreement, consisting of material circumstances to be hereafter extended more at large, and to be put into the form of an instrument, with a view to be signed by the parties, and no fraud, but the party takes advantage of the *locus pœnitentiæ*, he should not be compelled to perform such an agreement as that, *when he insists upon the statute of frauds*.

It is curious to observe the different opinions which have prevailed on this point. Lord Macclesfield held, that if the agreement was confessed, even a plea of the statute would not protect the defendant; in which opinion he seems to have been followed by Lord Hardwicke. On the other hand, Lord Bathurst thought that, unless there were fraud,

(*y*) See Cottington *v.* Fletcher, 2 Atk. 155; and see 3 Atk. 3; but see 4 Ves. jun. 24.

(*z*) 2 Bro. C. C. 559; 2 Dick. 664.

an admission of the agreement by the defendant would not enable the Court to decree it, although the defendant did not insist on the statute. Lord Thurlow appears to have been of opinion, that if the agreement was admitted, the statute could only be used as a defence where there was a clear *locus pœnitentiæ*, but that evidence could not be admitted to falsify the defendant's answer.

None of the foregoing opinions have, however, been attended to. Mr. Baron Eyre seems to have led the way in holding, that if the defendant, by his answer, insisted upon the statute of frauds, a specific performance could not be decreed, although he confessed the agreement (*b*). And Lord Thurlow, notwithstanding his opinion in Whitchurch v. Bevis, said, in the prior case of Whitbread v. Brockhurst, that it should rather seem that if the defendant confesses the agreement in his answer, but insists upon the statute, it would be more simple and conformable to reason to say, that the statute should be a bar to the plaintiff's claim (*c*); and these opinions have been adopted by Lord Rosslyn and Lord Eldon (*d*); and Sir William Grant actually decided, that the statute may be used as a bar to the relief, although the agreement be admitted (*e*). It is immaterial, he said, what admissions are made by a defendant insisting upon the benefit of the statute, for he throws it upon the plaintiff to show a complete written agreement; and it can no more be thrown upon the defendant to supply defects in the agreement, than to supply the want of an agreement.

(*b*) Stewart v. Careless, 2 Bro. C. C. 564, 565, cited; Walters v. Morgan, 2 Cox, 369.

(*c*) See 1 Bro. C. C. 416.

(*d*) Moore v. Edwards, 4 Ves. jun. 23; Cooth v. Jackson, 6 Ves. jun. 12; Row v. Teed, 15 Ves. jun. 375; see Rondeau v. Wyatt, 2 H. Blackst. 63; and 1 Rose, 300.

(*e*) Blagden v. Bradbear, 12 Ves. jun. 466; see also 2 Ball and Beat. 349.

 Where

Where, however, a defendant has, by answer, admitted the agreement, and submitted to perform it, he cannot, by an answer to an amended bill, plead the statute of frauds (*f*).

If the defendant deny the agreement, he may be tried for perjury; but a conviction will not enable equity to decree a performance of the agreement (*g*) (I); and therefore, as the plaintiff cannot avail himself, in any civil proceedings, of the conviction of the defendant, he is a competent witness to prove the perjury (*h*).

III. There are other cases taken out of the statute, not so much on the principle of no danger of perjury, as that the statute was not intended to create or protect fraud. Lord Keeper North appears to have entertained a floating opinion, although he does not seem to have ever actually decided the point, that if the plaintiff laid in his bill that it was part of the agreement, that the agreement should be put into writing, it would take the case out of the statute (*i*). In a case before Lord Thurlow (*k*), this doctrine was stated at the bar; and in answer to it, his Lordship said, he took that to be a single case, and to have been overruled. *If you interpose the medium of*

(*f*) Spurrier *v.* Fitzgerald, 6 Ves. jun. 548.

(*g*) Bartlett *v.* Pickersgill, 4 Burr. 2255; 4 East, 577, n. b; 1 Cox, 15. See Rastel *v.* Hutchinson, 1 Dick. 44, and Fell *v.* Chamberlain, 2 Dick. 484; Burdon *v.* Browning, 2 Taunt. 520.

(*h*) The King *v.* Boston, 4 East, 572.

(*i*) Hollis *v.* Whiteing, or Edwards, 1 Vern. 151, 159; Leake *v.* Morrice, 2 Cha. Ca. 135.

(*k*) Whitchurch *v.* Bevis, 2 Bro. C. C. 565.

(I) It appears that the plaintiff in Fell *v.* Chamberlain did prefer a bill of indictment for perjury against the defendant; and the Master of the Rolls granted an order to the six clerks to deliver the bill and answer, interrogatories, and depositions of witnesses to a solicitor, in order to be produced at the trial. Reg. Lib. A. 1772, fo. 496.

fraud

fraud, by which the agreement is prevented from being put into writing, I agree to it; otherwise I take Lord North's doctrine, 'that if it had been laid in the bill, that it was part of the agreement that it should be put into writing, it would have done,' to be a single decision, and contradicted, though not expressly, yet by the current of opinions."

So where agreements have been carried partly into execution, the Court will decree the performance of them, in order that one side may not take advantage of the statute, to be guilty of fraud (*l*) (I).

An agreement will not be considered as partly executed, unless the acts done are such as could be done with no other view or design than to perform the agreement; or perhaps, to speak more correctly, with the view of the agreement being performed; and if it do not appear but the acts done might have been done with other views, the agreement will not be taken out of the statute (*m*).

Neither will acts merely introductory, or ancillary to an agreement, be considered as a part performance, although attended with expense. Therefore, delivering an abstract, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations, &c. (*n*), will not take a parol agreement out of the statute.

(*l*) See 1 Ves. 221; Taylor *v.* Beech, 1 Ves. 297.

(*m*) Gunter *v.* Hasley, Ambl. 586; Lacon *v.* Mertins, 3 Atk. 1.

(*n*) Clerk *v.* Wright, 1 Atk. 12; Whitbread *v.* Brockhurst, 1 Bro. C. C. 412; Cole *v.* White, 1 Bro. C. C. 409, cited; Whitchurch *v.* Bevis, 2 Bro. C. C. 559; Whaley *v.* Bagenal, 6 Bro. P. C. 645; Cooke *v.* Tombs, 2 Anst. 420; and see Cooth *v.* Jackson, 6 Ves. jun. 12; and Redding *v.* Wilkes, 3 Bro. C. C. 400.

(I) The ground of relief in these cases is fraud, and that species of fraud which is conusable in equity only; although it seems that the Court of King's Bench once held, that where an agreement was partly executed, *it was totally out of the statute*. See 1 Bro. C. C. 417.

But if possession be delivered by the purchaser agreement will be considered as in part executed especially if he expend money in building or impr according to the agreement (*p*), for the statute should be so turned, construed, or used, as to protect or mean of fraud (*q*).

Possession, however, must be delivered in part formance; for if the purchaser obtain it wrongful will not avail him (*r*). And a possession which c referred to a title distinct from the agreement wi take a case out of the statute. Therefore, possessi a tenant cannot be deemed a part performance. Th livery of possession, by a person having possession person claiming under the agreement, is a strong marked circumstance; but a tenant of course contin

(*o*) Butcher *v.* Stapely, 1 Vern. 363; Pyke *v.* Williams, 2 Vern. 455; Lockey *v.* Lockey, Prec. Cha. 518; Earl of Aylesford's case, 2 Str. 783; Binstead *v.* Coleman, Bunb. 65; S. C. MS. in *tot. verbis*; Barrett *v.* Gomeserra, Bunb. 94; Lacon *v.* Mertins, 3 Atk. 1; Wills *v.* Stradling, 3 Ves. jun. 378; Bowers *v.* Cator, 4 Ves. jun. 91; Denton *v.* Stewart, 4th July 1786, cited in Mr. Fonbl. note to 1 Trea. Eq. 175 (I); Gregory *v.* Mighell, 18 Ves. jun. 328; Kine *v.* Balfe, 2 B Beat. 343; Morphett *v.* Jone Feb. 1818, MS.; 1 Swanst.

(*p*) Foxcraft *v.* Lister, 2 456; Gilb. Eq. Rep. 4, Colles P. C. 108, reported; *v.* Buckland, 2 Freem. 268 timer *v.* Orchard, 2 Ve 243; Toole *v.* Medlicott, and Beatty, 393. See Wh D'Esterre, 2 Dow. 359.

(*q*) See 3 Burr. 1919.

(*r*) Cole *v.* White, 1 Bro 409, cited.

(I) In this case the plaintiff not only purchased the house, t the furniture, for which she had actually paid; and it appears decree, that there was a receipt given by the defendant, the cont which, however, are not stated in the Register's book. The de positively denied the agreement, and insisted that the plaintiff w tenant at will. Reg. Lib. A. 1785, fo. 552, by the name of De Seward; *ibid.* 717, by the name of Denton v. Stewart.

posse

possession, unless he has notice to quit; and the mere fact of his continuance in possession (which is all that can be admitted, for *qua animo* he continued in possession is not a subject of admission) cannot weigh with the court (*s*).

But if he pay an additional rent, although that is *per se* an equivocal circumstance, (for it may be that he shall hold only from year to year, the lease being expired), yet there may be other inducements. If, therefore, it be averred that the landlord accepted the additional rent upon the foot of the agreement, the acceptance upon the ground of the agreement would not be equivocal at all. The landlord in such a case must answer, whether it was accepted upon a holding from year to year, or any other ground (*t*).

If it be part of such a contract with a tenant in possession, that money shall be laid out, and it is one of the considerations for granting the lease (the laying out which must be then with the privity of the landlord), it is very strong to take it out of the statute (*u*). But it is necessary that the act should unequivocally refer to and result from the agreement, and such that the party would suffer an injury amounting to fraud by the refusal to execute that agreement. Therefore, where upon the faith of a promise of a renewal, a tenant rebuilt a party-wall, the agreement was held to be within the statute. The act done was equivocal: for it would have taken place equally if there had been no agreement: it was such also as easily admitted of compensation, without executing the agreement. The money expended might be recovered from the landlord, if it was by the landlord that the expense was to be borne (*x*).

(*s*) Wills *v.* Stradling, 3 Ves. jun. 378; Smith *v.* Turner, Prec. Cha. 561, cited; Savage *v.* Carrol, 1 Ball and Beatty, 265.

(*t*) Wills *v.* Stradling, *ubi sup.*

(*u*) S. C.

(*x*) Frame *v.* Dawson, 14 Ves. jun. 386. See Lindsay *v.* Lynch, 2 Scho. and Lef. 1; O'Reilly *v.* Thompson, 2 Cox, 271.

In a late case, Lord Redesdale thought that it was absolutely necessary for courts of equity, in these cases, to make a stand, and not carry the decisions further (*y*).

It is generally understood, that payment of a substantial part of the purchase-money will take a parol agreement out of the statute. How far this opinion is founded, appears to be deserving of particular consideration.

There are four cases in Tothill, which arose previously to the statute of frauds, and appear to be applicable to the point under consideration; for equity, even before the statute of frauds, would not execute a mere parol agreement not in part performed. In the first case (*z*), which was heard in the 38th of Eliz. relief was denied, "because it was but a preparation for an action upon the case." In the two next cases (*a*), which came on in the 9th of Jac. I. parol agreements were enforced, apparently on account of the payment of very trifling parts of the purchase-money, but the particular circumstances of these cases do not appear. The last case reported in Tothill (*b*), was decided in the 30th of Jac. I. and the facts are distinctly stated. The bill was to be relieved concerning a promise to assure land of inheritance, of which there had not been any execution, but only 55*s.* paid in hand, and the bill was dismissed. This point received a similar determination, in the next case on the subject before the the statute, which is reported in Cha. Rep. (*c*), and was determined in the 15th Cha. II. So the same doctrine was adhered to in a case which occurred three years after-

(*y*) See 2 Scho. and Lef. 5.

(*z*) William *v.* Nevil, Toth. 135.

(*a*) Ferne *v.* Bullock, Toth. 206; Clark *v.* Hackwell, *ibid.* 228.

(*b*) Miller *v.* Blandist, Toth. 85.

(*c*) Simmons *v.* Cornelius, 1 Cha. Rep. 128.

wards,

ards, and is reported in Freeman (*d*); for although a rol agreement for a house, with 20*s*. paid, was decreed ithout further execution proved, yet it appears by the dgment, that the relief would not have been granted if e defendant, the vendor, had demurred to the bill, hich he had neglected to do, but had proceeded to proof. he last case I have met with previously to the statute, was cided in the 21st Car. II. (*e*), and there a parol agreeent, upon which only 20*s*. were paid, was carried into pecific execution. This case probably turned, like the e immediately preceding it, on the neglect of the dedants to demur to the bill. It must be admitted, that e foregoing decisions are not easily reconcileable, yet e result of them clearly is, that payment of a trifling art of the purchase-money, was not a part performance f a parol agreement. Whether payment of a considerable um would have availed a purchaser, does not appear. 1 Toth. 67, a case is thus stated: "Moyl *v.* Horne, by ason 200*l*. was deposited towards payment, decreed." his case may, perhaps, be deemed an authority that, rior to the statute, the payment of a substantial part of he purchase-money would have enabled equity to specially perform a parol agreement; but it certainly is too ague to be relied on.

Our attention is now called to the statute itself. The clause relating to lands declares generally, that no contract, not in writing, shall be binding; there is also a clause in the act, which relates to sales of goods, which are declared to be binding if something is given in earnest to bind the bargain.

The first case in the books, subsequently to the statute, is in Freem. (*f*), where it is stated, that a contract for

(*d*) Anon. 2 Freem. 128.
(*e*) Voll r. Smith, 3 Cha. Rep. 16.
(*f*) 1 Freem. 486. pl. 664. b.

land,

land, and *a great part* of the money paid, is void since the statute of frauds and perjuries; but the party that paid the money may, in equity (I), recover back the money. And for this, Freeman states, he saw Sir William Jones's opinion under his hand. This was about four years after the act. The next case is Leak *v.* Morrice (*g*), which occurred in the same year; the bill was to have an agreement performed by the defendants; which was, in effect, that the defendant should assign a term of years in his house and certain goods, for two hundred guineas, whereof he paid one in hand as earnest of the bargain, and three days after nineteen guineas more; and part of the bargain was, that it should be executed by writings, by a certain time. The defendant pleaded the statute of frauds, and alleged the money was only paid for the lease, but confessed the receipt of the twenty guineas, and offered to repay them. Lord Keeper North said, it was clear that the defendant ought to repay the money, but overruled the plea on another ground. In this case it does not appear to have occurred to either the bar or the court, that payment of money would take a parol contract for lands out of the statute. The case of Alsop *v.* Patten (*h*), arose about fifteen years afterwards. There a joint lessee of a building lease agreed to sell his moiety to the other lessee for four guineas, and accepted a pair of compasses in hand to bind the bargain. The vendor pleaded the statute to a bill filed by the purchaser for a performance in specie. Lord Chancellor Jeffries ordered him to answer, and saved the benefit of the plea to the hearing, as the agreement was, in some part, executed. In this case, unless there was a part performance of the agreement, indepen-

(*g*) 2 Ch. Ca. 135; 1 Dick. 14. (*h*) 1 Vern. 472.

(I) At this day it may be recovered at law.

dently

dently of the mere delivery of the compasses, it is clear that the Court confounded the section of the statute by which personal contracts are binding, if earnest is paid, with the clause relating to land. The next case is Seagood *v.* Meale (*i*), which arose thirty-four years after the case of Alsop *v.* Patten. The case was, that upon a parol agreement for sale of an estate for 150*l.* a guinea was paid, and the payment of the guinea was agreed to be clearly of no consequence in case of an agreement touching lands or houses, the payment of money being only binding in cases of contracts for goods. In this case we find the doctrine laid down generally, that the payment of money is not a part performance of a parol agreement for lands, and no distinction was taken, as seems sometimes to have been thought, between the payment of a substantial part of the purchase-money, and of a trifling portion. Then comes the case of Lord Fingal, or Lord Pengal *v.* Ross, which was decided by Lord Cowper, in the 8th of Anne (*k*) (l). *A* agreed with *B* to make him a lease for twenty-one years of lands rendering rent, *B* paying *A* 150*l.* fine. *B* paid 100*l.* in part, then *A* refused to execute the agreement; and upon a bill filed for a specific performance, the agreement was held to be within the statute; but the 100*l.* was decreed to be refunded. The Lord Chancellor said, the payment of this 100*l.* was not such a performance of the agreement on one part, as to decree an execution on the other; for the statute of frauds makes one sort of contracts, viz. personal contracts, good, if any money is paid in earnest. Now that statute says, that no agreement concern-

(*i*) Prec. Cha. 560. (*k*) 2 Eq. Ca. Abr. 46. pl. 12.

(l) It has been said, that this case is not to be found in the Register's book. See 4 Ves. jun. 721. The author himself has searched the Register's calendars for 1709 and 1710 without success. The search was made under the letters L. (the plaintiff being a lord) P. and F.

ing

ing lands shall be good, except it is reduced into writing; and therefore, a parol agreement, as it was in that case, would not be good by giving money by way of earnest. Thus far no room is left for doubt; but in Lacon *v.* Mertins (*l*), Lord Hardwicke laid it down, that paying money had always been considered as a part performance. This, however, was a mere *dictum*; it was not necessary to decide the question; the cases on the subject were not cited; and another rule is laid down too generally in the same report. A case, indeed, is said to have been decided in 1750 (*m*), at which time Lord Hardwicke was Chancellor, where the bill was to compel the *acceptance* of a lease under a parol agreement upon a fine of 150*l.* and 16*l.* paid in part of the same; and the plea was overruled, without hearing the counsel for the plaintiff, and the decision, it is said, appears by the Register's book (I). But it does not appear from this statement, whether there was or was not any other act or part performance; and it is a sufficient objection to this decision, that the plaintiff's counsel were not heard, as no one can deny that the point was open to argument. The next case is a recent one (*n*), in which Lord Rosslyn held, that the payment of a small sum, as five guineas, where the purchase-money is 100*l.*

(*l*) 3 Atk. 1.

(*m*) Dickinson *v.* Adams, 4 Ves. jun. 722, cited.

(*n*) Main *v.* Melbourn, 4 Ves. jun. 720.

(I) The author has searched the Register's calendars for 1750, with great attention, without meeting the case. He met with only one case, where the plaintiff's name was Dickinson, and there the defendant's name was Baskerville; and the case is on a different point. Reg. Lib. A. 1750, fol. 545. Neither does a case in the same book, fol. 514, by the name of Davids *v.* Adams, embrace the point in question. The search was made under the letter A. as well as the letter D.—Note, the case perhaps turned on the principle stated in p. 111, *infra*.

would

would not take the case out of the statute; but he seemed clearly of opinion, that payment of a considerable part of the purchase-money would be sufficient: and he treated the case of Lord Fingal *v.* Ross as ill-determined. However, it was not necessary to decide the question. The opinion was clearly extra-judicial. In the late case of Coles *v.* Trecothick (*o*), where the purchase-money was 20,000*l.* and 2,000*l.* were paid in part, the point was treated at the bar as doubtful, and the Court evidently declined giving an opinion on the subject.

Upon the whole, it appears clearly, that since the statute of frauds, the payment of a small sum cannot be deemed a part performance. The *dicta* are in favour of a considerable sum being a part performance, but this construction is not authorized by the statute, and it is opposed by a case in which the contrary was decided, upon the most convincing grounds. On this subject, Sir William Grant's admirable judgment in Butcher *v.* Butcher (*p*), must occur to every discerning mind; it turns on a subject so applicable to the present, that his arguments, with a slight alteration, directly bear upon it. To say that a *considerable* share of the purchase-money must be given, is rather to raise a question than to establish a rule. What is a considerable share, and what is a trifling sum? Is it to be judged of upon a mere statement of the sum paid, without reference to the amount of the purchase-money? If so, what is the sum that must be given to call for the interference of the Court? What is the limit of amount at which it ceases to be trifling, and begins to be substantial? If it is to be considered with reference to the amount of the purchase-money, what is the proportion which ought to be paid? Mr. Booth also was impressed with this difficulty,

(*o*) 9 Ves. jun. 234; *Ex parte* Hooper, 1 Mer. 7.

(*p*) 9 Ves. jun. 382.

culty, although his sentiments are not so forcibly expressed. Where, he asks, will you strike the line? And who shall settle the quantum that shall suffice in payment of part of any purchase-money, to draw the case out of the statute; or ascertain what shall be deemed so trifling as to leave the case within it (*q*)?

Since the above observations were written, a decision of Lord Redesdale's has appeared, in which he held clearly that payment of purchase-money is not a part performance; and although his Lordship did not advert to all the cases on the subject, yet it is sincerely to be hoped that his decision will put the point at rest. He said, that it had always been considered that the payment of money is not to be deemed a part performance, to take a case out of the statute. Seagood *v.* Meale is the leading case on that subject; there a guinea was paid by way of earnest; and it was agreed clearly, that that was of no consequence in case of an agreement touching lands; now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally; for it is paid in both cases as part payment, and no distinction can be drawn (*r*): but the great reason, his Lordship added, why part payment does not take such an agreement out of the statute, is, that the statute has said, that in another case, viz. with respect to goods, it shall operate as a part performance. And the courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the Legislature said it should bind in case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands (*s*).

(*q*) 1 Ca. and Opin. 136.

(*r*) See acc. Pordage *v.* Cole, 1 Saund. 319.

(*s*) Clinan *v.* Cooke, 1 Scho. and Lef. 22; and see O'Herlihy *v.* Hedges, *ibid.* 123; 14 Ves. jun. 388.

But

But, even admitting that the payment of purchase-money may be deemed a part performance, yet the payment of the auction duty, however considerable, will not enable the Court to decree a specific performance of a parol agreement; as the revenue laws cannot be held to operate beyond their direct and immediate purpose, to affect the property, and vary the rights of the parties not within the intention of the act (*t*).

In some cases it has been decided, that acts done by the defendant to his own prejudice, could be made a ground for compelling him to perform the agreement; but in a late case (*u*), the Master of the Rolls held the contrary, where there is no prejudice to the plaintiff, because the ground on which the Court acts, is fraud in refusing to perform, after performance by the other party (*x*); but where the defendant has, for instance, paid the auction-duty or purchase-money, it is no fraud on the vendor, *but a loss to himself*, which ought not to be made a ground for a specific performance against his consent.

Where a person purchases several lots of an estate, included in distinct articles of sale, a part performance as to one lot, will not be deemed a part performance as to the other lots, and will therefore only take the agreement out of the statute as to the lot in respect of which there was a part performance (*y*).

It may happen, that although an agreement be in part performed, yet the Court may not be able to ascertain the

(*t*) Buckmaster *v.* Harrop, 7 Ves. jun. 341; 13 Ves. jun. 456.

(*u*) Buckmaster *v.* Harrop, *ubi sup.* See Hawkins *v.* Holmes, 1 P. Wms. 770; and see *post*, ch. 4, n. observations on Potter *v.* Potter.

(*x*) See Popham *v.* Eyre, Lofft, 786; Clinan *v.* Cooke, 1 Scho. and Lef. 22; and O'Herlihy *v.* Hedges, *ibid.* 123.

(*y*) Buckmaster *v.* Harrop, 7 Ves. jun. 341.

terms,

terms, and then it seems the case will not be taken out of the statute. If, however, the terms be made out satisfactorily to the Court, contrariety of evidence is not material (*z*), and the Court will use its utmost endeavours to get at the terms of the agreement.

In the case of Mortimer *v.* Orchard (*a*), where a parol agreement with two persons had been in part performed, the plaintiff's witness proved an agreement different from that set up by the bill, and the defendants stated an agreement different from both. The Chancellor thought in strictness the bill ought to be dismissed, but as there had been an execution of some agreement between the parties, and there were two defendants who proved the agreement set up by their answers, he decreed a specific performance of the agreement confessed by the answers.

In one case where, upon the faith of a parol agreement, a man entered and built, it was proved that the defendant told the plaintiff that his word was as good as his bond, and promised the plaintiff a lease when he should have renewed his own from his landlord. Lord Chancellor Jefferies said, that the defendant was guilty of a fraud, and ought to be punished for it; and so decreed a lease to the plaintiff, *though the terms were uncertain.* It was, he said, in the plaintiff's election for what time he would hold it, and he elected to hold during the defendant's term at the old rent, but the *plaintiff* was to pay costs (*b*).

And in a case from Yorkshire, possession having been delivered in pursuance of a parol agreement, and a dispute arising upon the terms of the agreement, Lord Thurlow sent it to the Master, upon the ground of the possession

(*z*) See 1 Ves. 221.

(*a*) 2 Ves. jun. 243. See Lindsay *v.* Lynch, 2 Scho. and Lef. 1.

(*b*) Anon. 5 Vin. Abr. 523. pl. 40; and see Anon. *ib.* 522. pl. 38.

being

being delivered, to inquire what the agreement was. The difficulty was in ascertaining what the terms were. The Master decided as well as he could, and then the cause came on before Lord Rosslyn, upon further directions, who certainly seemed to think Lord Thurlow had gone a great way, and either drove them to a compromise, or refused to go on with the decree upon the principle upon which it was made (*c*).

Lord Thurlow, however, appears to have formed a settled opinion upon this point. For in Allan *v.* Bower (*d*), where his Lordship considered the written memorandum as evidence of a parol agreement, which was in part performed (whether rightly or not (*e*) is immaterial to the present question), he directed the Master, *who had refused to admit parol evidence*, to inquire and state what the promise was, that was mentioned in the memorandum, and at what time the promise was made, *and what interest the tenant was to acquire in the premises under such promise*; and the Master was to be at liberty to state specially any particular circumstances that might arise on such inquiries, and the parties were to be examined on interrogatories. In consequence of this order, evidence was received, which proved that the tenant was to hold during his life; and Lord Thurlow decreed a lease to be executed accordingly.

So in a case before Lord Redesdale, where an agreement in writing was held to be within the statute, because the term for which it was to be granted was not expressed, his Lordship said, he should have had great difficulty if there were evidence of part performance. *He must have directed a further inquiry*, for the party had not suggested by his bill, that the agreement was for any specific term,

(*c*) Anon. 6 Ves. jun. 470, cited by Lord Eldon.

(*d*) 3 Bro. C. C. 149.

(*e*) See 1 Sch. and Lef. 37.

and

and the case stood both on the pleadings and evidence imperfect on that head (*f*). And in a late case before Lord Eldon, he thought the Court must at least endeavour to collect, if they can, what are the terms the parties have referred to (*g*).

But in the case of Symondson *v.* Tweed (*h*), it was laid down, that in all cases wherever the Court had decreed a specific execution of a parol agreement, yet the same had been supported and made out by letters in writing, *and the particular terms stipulated therein*, as a foundation for the decree; otherwise the Court would never carry such an agreement into execution. And in a case before the late Lord Alvanley, when Master of the Rolls (*i*), he is reported to have said, "I admit my opinion is, that the Court has gone rather too far in permitting part performance, and other circumstances, to take cases out of the statute, and then, unavoidably perhaps, after establishing the agreement, to admit parol evidence of the contents of that agreement. As to part performance, it might be evidence of some agreement, but of what, must be left to parol evidence. I always thought the Court went a great way. They ought not to have held it evidence of an unknown agreement, but to have had the money laid out repaid. It ought to have been a compensation. Those cases are very dissatisfactory. It was very right to say, the statute should not be an engine of fraud, therefore compensation would have been very proper. They have, however, gone farther, saying, it was clear that there was some agreement, and letting them prove it; but how does the circumstance of having laid out a great deal of money, prove

(*f*) Clinan *v.* Cooke, 1 Scho. and Lef. 22.

(*g*) Boardman *v.* Mostyn, 6 Ves. jun. 467.

(*h*) Prec. Cha. 374; Gilb. Eq. Rep. 35.

(*i*) Forster *v.* Hale, 3 Ves. jun. 712, 713.

that

that he is to have a lease for ninety-nine years? The common sense of the thing would have been to have let them bring an action for the money. I should pause upon such a case," And Lord Eldon has said, that perhaps if it was *res integra*, the soundest rule would be, that if the party leaves it uncertain, the agreement is not taken out of the statute sufficiently to admit of its being enforced.

In a late case in Ireland, where after a part performance of a parol agreement the purchaser died, and there was no evidence of the amount of the price agreed on, or of the quantity of estate to be conveyed, Lord Manners refused to grant a reference for the purpose of ascertaining the terms of the contract. There was, his Lordship said, no evidence whatever of the terms, and the reference was sought to supply the entire absence of this very material part of the case. Where there is a contradictory evidence in a case that raises a doubt in the mind of the Court; that is to say, where the case is fully proved by the party on whom the onus of proof lay, but that proof shaken or rendered doubtful by the evidence on the other side, there the Court will direct a reference or an issue to ascertain the fact; but where there is no evidence whatever, would it not, he asked, be introducing all the mischiefs intended to be guarded against by the rules of the Court, in not allowing evidence to be gone into after publication, and holding out an opportunity to a party to supply the defect by fabricated evidence, if he were to direct such an inquiry? He therefore did not think himself at liberty from the evidence in the case to direct the reference or issue desired (*j*).

We cannot but observe then, that considerable reluctance is manifested to carry parol agreements into execu-

(*j*) Savage *v.* Carroll, 1 Ball and Beatty, 265. See *ibid.* 404, 550, 551.

tion, on the ground of part performance, where the terms do not distinctly appear; but notwithstanding the case before Lord Manners, there appears to be abundant authority to prove that the mere circumstances of the terms not appearing, or being controverted by the parties, will not, of itself, deter the Court from taking the best measures to ascertain the real terms. And we may remark, that it can rarely happen, that an agreement cannot be distinctly proved, where the estate is absolutely sold. Most of the cases on this head have arisen on leases, where the covenants, &c. are generally left open to future consideration.

Where a parol agreement is so far executed as to entitle either of the parties to require a specific execution of it, it will be binding on the representatives of the other party in case of his death, to the same extent as he himself was bound by it (*k*).

In a case before Lord Redesdale (*l*), he held that a contract by a tenant for life with a power of leasing, to grant a lease under his power, was binding on the remainder-man. In the course of the argument, a question was put from the bar, whether, if this had been a case of a parol agreement in part performed, it could be enforced? In answer to which, Lord Redesdale expressed himself thus: "That, I think, would raise a very distinct question, a question upon the statute of frauds; and perhaps a remainder-man might be protected by the statute, though the tenant for life would not. For the party himself is bound by a part performance of a parol execution of a parol agreement, principally on the ground of fraud, which is personal. Such a ground could scarcely be made to apply to the case of a remainder-man, unless money had been expended and there had been an acquiescence after the remainder

(*k*) *Vide infra*, ch. 4.

(*l*) Shannon v. Bradstreet, 1 Scho. and Lef. 52.

vested,

vested, which were held by Lord Hardwicke, in Stiles *v.* Cowper, 3 Atk. 692, in the case of an actual lease under a power, but with covenants not according to the power, to bind the remainder-man to grant a lease for the same term with covenants according to the power."

In a case where it was alleged on the one side, that under a parol agreement the purchase-money had been paid and possession delivered; and on the other, that there was no sale, but that possession was delivered to make a qualification, and the alleged purchaser was a mere agent, and both the seller and purchaser were dead; an issue was directed whether the purchaser was, at his death, beneficially entitled to the premises in question (*m*).

These remarks may be closed by observing, that equity seems to have been guided by nearly the same rules in compelling a specific performance of parol agreements before the statute (*n*), as have been adhered to since; but still, the student cannot be too cautious in distinguishing the cases which were decided before the statute from those decided subsequently. Much confusion has arisen from inattention to this point.

(*m*) Burkett *v.* Randall, 3 Mer. 466.

(*n*) See Miller *v.* Blandist, Toth. 85; William *v.* Nevil, *ibid.* 135; Ferne *v.* Bullock, *ibid.* 238. 200; Clark *v.* Hackwell, *ibid.* 260; Simmons *v.* Cornelius, 1 Cha. Rep. 128; Anon. 2 Freem. 128; Voll *v.* Smith, 3 Cha. Rep. 16; and see Marquis of Normanby *v.* Duke of Devonshire, 2 Freem. 217.

SECTION IV.

Of the Admissibility of Parol Evidence to vary or annul Written Instruments.

OF this learning we may treat under three heads. 1st, where there is not any ambiguity in the written instrument; 2dly, where there is an ambiguity; and, 3dly, where a term of an agreement is omitted or varied in the written instrument by mistake or fraud.—And,

I. Previously to the statute of frauds, parol evidence might have been given of collateral and independent facts, which tended to support a deed. Thus, although a valuable consideration was always essential to the validity of a bargain and sale, yet Rolle laid it down, that (*o*) upon *averment* that the deed was in consideration of money, or other valuable consideration given, the land should pass, because the averment was consistent with the deed. The same rule has prevailed since the statute of frauds. Where in a conveyance 28*l.* only were stated to have been received, parol evidence was admitted to prove that 2*l.* more were actually paid (*p*). And in a later case, parol evidence was received, that a sum of money was paid as a premium in order to constitute the relation of master and apprentice, although no mention of it was made in the written agreement entered into between the parties (*q*). In all these cases we observe, that the evi-

(*o*) 2 Ro. Abr. 786. (N.) pl. 1; and see 1 Rep. 176. a.

(*p*) *Rex* v. the Inhabitants of Scammonden, 3 Term Rep. 474.

(*q*) *Rex* v. the Inhabitants of Laindon, 8 Term Rep. 379; and see 2 Cha. Ca. 143.

dence

dence is not offered to contradict or vary the agreement, but to ascertain an independent fact, which is consistent with the deed, and which it is necessary to ascertain, with a view to effectuate the real intention of the parties.

It is, however, clearly settled, that parol evidence is not admissible to disannul and substantially vary a written agreement; for, as Lord Hardwicke observes, to add any thing to an agreement in writing by admitting parol evidence, is not only contrary to the statute of frauds and perjuries, but to the rule of the common law before that statute was in being (*r*).

Thus, in a leading case on this subject (*s*), it appeared that by an agreement in writing, the grass and vesture of hay from off a close of land, called Boreham's Meadow, were to be taken by one Ansell. The subscribing witness to the agreement proved the written agreement, and he and another person deposed, that it was at the same time (when the written agreement was made) agreed by the parties by *parol*, that Ansell should not only have the hay from off Boreham Meadow, but also the possession of the soil and produce of that and another close of land. The cause was tried at *nisi prius* before Lord Mansfield, who admitted the evidence, and afterwards reported that he was not dissatisfied with the verdict in consequence of it. But Lord Chief Justice De Grey, and the other Judges of the Court of Common Pleas, held decidedly, that the evidence was totally inadmissible, as it annulled and substantially altered and impugned the written agreement.

(*r*) Parteriche *v.* Powlet, 2 Atk. 383; and see Tinney *v.* Tinney, 3 Atk. 8; Binstead *v.* Coleman, Bunb. 65; Hogg *v.* Snaith, 1 Taunt. 347.

(*s*) Meres *v.* Ansell, 3 Wils. 275; and see Mease *v.* Mease, Cowp. 47; Lofft. 457; Cuff *v.* Penn, 1 Maul. and Selw. 21; Greaves *v.* Ashlin, 3 Campb. 426; Hope *v.* Atkins, 1 Price, 143.

So in Preston *v.* Merceau (*t*), by an agreement in writing a house was let at 26 *l.* a year; and the landlord attempted to show, by parol evidence, that the tenant had agreed to pay the ground-rent for the house to the original landlord, over and above the 26 *l.* a year; but the Court of Common Pleas rejected the evidence.

And upon the general rule of law, as it seems, independently of the statute of frauds, it has been determined that verbal declarations by an auctioneer in the auction-room, contrary to the printed conditions of sale, are inadmissible as evidence, unless perhaps the purchaser has particular personal information given him of the mistake in the particulars (*u*).

In a late case (*w*), upon the sale of timber by a written particular, which was silent as to the quantity, it was attempted to show, that the auctioneer verbally warranted the quantity to be eighty tons, and it was insisted that this evidence was admissible, because it did not *contradict* the particulars, but merely supplied its defect in not stating the quantity. But it was held that the evidence was not admissible. Lord Ellenborough said, that the purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, he knew of no instance where a party might not, by parol testimony, superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect. There was no doubt, his Lordship added, that the warranty as

(*t*) 2 Blackst. 1249.

(*u*) Gunnis *v.* Erhart, 1 H. Blackst. 289. See 13 Ves. jun. 471, and *infra*; and Fife *v.* Clayton, 13 Ves. jun. 546; Higginson *v.* Clowes, 15 Ves. jun. 516.

(*w*) Powell *v.* Edmunds, 12 East, 6; Jones *v.* Edney, 3 Campb. 285.

to

to the quantity of timber would not vary the agreement contained in the written conditions of sale.

So, since the act of Parliament for altering the stile, a demise from Michaelmas must be taken to be from new Michaelmas, and parol evidence cannot be admitted to show that the parties intended it to commence at old Michaelmas (*x*), unless the demise is by parol (*y*).

The rules of evidence are universally the same in courts of law and equity. Therefore parol evidence, which goes to substantially alter a written agreement, cannot be received in a court of equity any more than in a court of law (*z*).

Thus in the case of Lawson *v.* Laude (*a*), a bill was brought to carry into execution an agreement between the plaintiff and defendant, for granting to the defendant a lease of a farm. The defendant objected to execute the lease, because some land, called Oxlane, agreed to be demised, was left out of the lease. The plaintiff offered evidence to prove, that it was left out by the particular and joint direction of the plaintiff and defendant. Sir Thomas Clarke held the evidence to be in direct contradiction to the statute of frauds, and therefore dismissed the bill.

So in a case before Lord Bathurst (*b*), where a bill was filed for an injunction to stay proceedings at law for a breach of covenant, in not assigning *all* the premises, which the defendant insisted by an agreement in writing, and a lease in pursuance of it, were to be assigned. The plaintiff stated by his bill, that though the agreement was

(*x*) Doe *v.* Lea, 11 East, 312.

(*y*) Doe *v.* Benson, 4 Barn. and Ald. 588.

(*z*) See 3 Wils. 276; and see Foot *v.* Salway, 2 Cha. Ca. 142.

(*a*) 1 Dick. 346.

(*b*) Fell *v.* Chamberlain, 2 Dick. 484. I could not meet with the facts in the Register's book; see Reg. Lib. A. 1772, fol. 1. 496.

for

for *all* the premises, yet the defendant, at the time of the execution of the lease, agreed, that three pieces of land should be excepted, and the plaintiff examined several witnesses to prove the fact, which they did; but the defendant by his answer denied the fact, and insisted upon the extent of the written agreement; and the parol evidence being objected to at the hearing, it was not permitted to be read.

And in an important case before Lord Eldon (*c*), his Lordship refused to execute an agreement with a variation attempted to be introduced by parol on the ground of mistake, or at least of surprise, which was denied by the answer. So in the late case of Woollam *v.* Hearn (*d*), where a specific performance was sought of an agreement for a lease, at a less rent than that mentioned in the agreement, which variation was introduced by parol, on the ground of fraud and misrepresentation in the landlord; the evidence was read without prejudice, and the Master of the Rolls thought it made out the plaintiff's case; but his Honor held himself bound by the authorities, and accordingly rejected the evidence, and dismissed the bill. And this doctrine has been distinctly recognized by Lord Redesdale (*e*).

So verbal declarations, in opposition to printed conditions of sale, are inadmissible as evidence in equity as well as at law (*f*).

And if a material term be added by one party to a written agreement after its execution, he destroys his own rights under the instrument. But although this doctrine

(*c*) Marquis of Townshend *v.* Stangroom, 6 Ves. jun. 328. See 1 Ves. and Bea. 526, 527.

(*d*) 7 Ves. jun. 211.

(*e*) 1 Scho. and Lef. 39.

(*f*) Jenkinson *v.* Pepys, 6 Ves. jun. 330, cited; 15 Ves. jun. 521; 1 Ves. and Bea. 528; see 15 Ves. jun. 471. 540; Higginson *v.* Clowes, 15 Ves. jun. 516.

has been referred to the statute of frauds, yet it seems rather to depend on the principles of the common law (*g*).

But when equity is called upon to exercise its peculiar jurisdiction, by decreeing a specific performance, *the party to be charged* is to be let in to show, that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed (*h*).

Therefore a defendant resisting a specific performance of an agreement, may prove by parol evidence, that by fraud the written agreement does not contain the real terms (*i*). Such evidence was admitted by Lord Hardwicke in Joynes *v.* Statham (*k*); and in the late case of Woollam *v.* Hearn (*l*), before cited, the Master of the Rolls said, that if it had been a bill brought by the defendant for a specific performance, he should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance.

So Lord Hardwicke admitted, that an omission by mistake or surprise, would let in the evidence as well as fraud; and Lord Eldon in a recent case actually admitted parol evidence of surprise, as a defence to a bill seeking a performance in specie; but his Lordship said, that those producing evidence of mistake or surprise, in opposition to a specific performance, undertake a case of great difficulty (*m*). In a later case, the Master of the Rolls admitted parol evidence on behalf of a defendant to show a parol promise at the time of signing the agreement to vary the terms of it, and upon the evidence he dismissed the bill for a specific performance of the written agreement (*n*).

(*g*) Powell *v.* Divett, 15 East, 29.

(*h*) See 7 Ves. jun. 219.

(*i*) See the cases cited *infra*, as to discharging or varying a written agreement by parol; and see Walker *v.* Walker, 2 Atk. 98; and see 6 Ves. jun. 337, n.

(*k*) 3 Atk. 388.

(*l*) 7 Ves. jun. 211.

(*m*) Marquis of Townshend *v.* Stangroom, 6 Ves. jun. 328.

(*n*) Clarke *v.* Grant, 14 Ves. jun. 519; and see 15 Ves. jun. 528.

And

And where lands, which upon admeasurement did contain thirty-six acres, were described in a particula contain forty-one acres by estimation, were the same n or less, and the purchaser in answer to a bill for a spe performance set up parol declarations of the auctioneer he sold it for forty-one acres, and if it was less, an ab ment should be made, his Honor admitted the evid and dismissed the bill, because after such a declara made by the auctioneer, it was fraudulent and unfair in seller to insist upon the execution of the contract, not ing the defendant the benefit of that declaration (*o*).

So where by the *mistake* of the solicitor the ag ment only required the purchaser to bear the expens the conveyance, whereas the real agreement was, tha should also bear the expense of making out the title, Master of the Rolls admitted parol evidence of the agreement and of the mistake; and upon the strengt it, his Honor gave the plaintiff, the purchaser, his op to have his bill, which was for a specific performance cording to the terms of the written agreement, dismis or to have the agreement performed in the way conten for by the seller (*p*).

But in a case where a written agreement for a lease varied in part by parol, and upon a bill filed by the te for a specific performance of the original agreement, landlord set up a subsequent parol waver of the wri agreement, and a new agreement entered into at his so tor's, every term of which was to the disadvantage of plaintiff, without any consideration for the variation; Master of the Rolls decreed a specific performance acc

(*o*) Winch *v.* Winchester, 1 Ves. and Beam. 375.

(*p*) Ramsbottom *v.* Gosden, 1 Ves. and Beam. 165. See Flood *v.* Finlay, 2 Ball and Beatty, 9; Lord William Gordon *v.* Ma of Hertford, 2 Madd. 106; rard *v.* Girling, 1 Wils. Ch. 460.

ing to the prayer of the bill. His Honor considered the case made *out by the landlord* (*q*) *not a waver of the contract*, but a variation by parol which had not been acted upon, and which was made without consideration. The first parol variation, it may be observed, was admitted, and the plaintiff would have been willing to execute it.

And in a case where an estate was sold in lots, and at the end of some of the lots only it was stated that the timber was to be taken at a valuation, but there was a general condition that the timber should be paid for; the seller's bill for a specific performance, requiring the purchaser of several lots to pay for all the timber, was dismissed, and parol evidence of the declaration of the auctioneer that the timber on all the lots was to be paid for, was rejected. The purchaser then filed a bill against the seller for a specific performance, according to his construction that he was to pay for the timber on the lots only to which a stipulation to that effect was added. The seller, *as defendant*, offered parol evidence of the declaration, by the auctioneer. The Vice-Chancellor agreed, that fraud, mistake, or surprise, would let in the evidence as a defence; but no authority having decided that evidence can be received except upon one of those grounds, and these declarations in the case before his Honor being offered where the parties had contracted in writing upon a subject distinctly adverted to in their written contract, which made a provision for it, (whether explicit and satisfactory is not material), the evidence of these declarations must be rejected, because there was no fraud, mistake, or surprise, and the evidence was offered to contradict, explain, or vary the written contract (*r*). It was not, however, necessary to decide the point; and it may perhaps deserve re-consideration whether the evidence might

(*q*) Price v. Dyer, MS.; S.C. 17 Ves. jun. 356.

(*r*) Clowes v. Higginson, 1 Ves. and Bea. 524.

might not be deemed admissible in equity as a *defence*, simply on the ground that the plaintiff, who ought to come into equity with clean hands, sought to commit a fraud in evading to pay for the timber, although the auctioneer declared that it was to be paid for.

The case before Lord Eldon (*s*) shows the rule of equity in a strong light. The landlord filed a bill for a specific performance of the written agreement, varied by the parol evidence; the tenant filed a cross-bill for a specific performance of the written agreement. The result was, that both bills were dismissed; the first, because parol evidence was not admissible as a foundation for a decree *enforcing* a specific performance; the second, on the ground that such evidence was admissible to rebut the equity of the plaintiff in the second bill.

A similar case appears to have been decided by Lord Chancellor Macclesfield. The case has, I believe, never been cited, and it requires some attention to get at the facts. They appear, however, to be, that the plaintiff in the first bill sought a specific performance of an agreement by him to grant a lease to the defendant. The defendant set up a parol agreement, by which he was to have liberty to grub bushes, and exhibited a cross-bill for a performance *in specie* of the written agreement, with the addition of a clause, to grub bushes according to the parol agreement; and both the bills were dismissed, but without costs (*t*).

Upon the admissibility of parol evidence, as a defence to a bill seeking a specific performance, Lord Redesdale has forcibly observed, that it should be recollected what are the words of the statute: "No person shall be charged

(*s*) Lord Townshend *v.* Stangroom.

(*t*) Hosier *v.* Read, 9 Mod. 86. I have searched the Register's books for this case without success.

upon any contract or sale of lands, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." No person shall be charged with the execution of an agreement who has not, either by himself or his agent, signed a written agreement; but the statute does not say, that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, "That is not the agreement meant to have been signed." Such a case is left as it was by the statute: it does not say, that a written agreement shall bind, but that an unwritten agreement shall not bind (*u*). And nearly the same observations upon the negative words of the statute, were made by Lord Chief Baron Skinner in the great case of Rann and Hughes (*x*).

But if parties enter into an agreement which is correctly reduced into writing, and at the same time add a term by parol, equity cannot look out of the agreement, although the person insisting upon the parol agreement is a defendant, and sets it up as a bar to the aid of the Court in favour of the plaintiff.

Thus, in Omerod *v.* Hardman (*y*), the vendor filed a bill for a specific performance. It was not mentioned in the written agreement at what time the purchaser was to take possession of the estate; but the purchaser, the defendant, offered parol evidence to show, that it was at the same time agreed, though not made part of the written agreement, that he should be let into possession at a stated time; and

(*u*) 1 Scho. and Lef. Rep. 39.
(*x*) 7 Term Rep. 350, n.
(*y*) 5 Ves. jun. 722.

he resisted a performance of the agreement, on the ground of possession not having been delivered to him according to the parol agreement. Mr. Justice Chambre objected to the evidence being read. He said, that it was urged for the defendant, that evidence may be read where the parol agreement is not inconsistent with the written agreement. This, (that is the parol agreement, in the case before him) he added, was to further the written agreement, and to secure what was through carelessness omited to be provided for in the written agreement, viz. delivery of possessions, according to the custom of the country. Mr. Baron Graham said, that the parol agreement could only be admitted where the written agreement was not drawn according to the intention of the parties at the time. You cannot by parol add any thing to what was the real agreement at the time, after that has been correctly reduced into writing. And he entirely agreed with Mr. Justice Chambre, that the parol could not be made to form part of the written agreement.

Lord Hardwicke is reported (*z*) to have said, that a plaintiff seeking a specific performance might enter into parol evidence to show that the defendant was to pay the rent clear of taxes, no mention being made of taxes in the agreement; because it was an agreement executory only, and, as in leases, there were always covenants relating to taxes, the Master would inquire what the agreement was as to taxes, and therefore the proof would not be a variation of the agreement. And this extra-judicial opinion appears to have been approved of by two enlightened judges (*a*), one of whom (*b*) laid it down, that parol evidence was admis-

(*z*) 3 Atk. 389. 390; but see 4 Bro. C. C. 518; 6 Ves. jun. 335, n. 1 Scho. and Lef. Rep. 38.

(*a*) See 2 Blackst. 1250; 7 Ves. jun, 221.

(*b*) Mr. Justice Blackstone.

sible

rove collateral matters, concerning which nothing in the agreement, as who was to put the house , or the like.

ɔtwithstanding these *dicta*, it has been expressly that parol evidence of even collateral matters, such yment of taxes, &c. which are of the essence of the at, is inadmissible both at law and in equity. Thus, ɔ. Jackson (*c*), it appeared that William Stiles and Jackson entered into a treaty for the lease of a longing to Stiles, and in a conversation between he subject, Jackson offered 80*l.* a year rent, and ould pay all the taxes, which Stiles agreed to An agreement was drawn up by Jackson, in his d-writing, in which no notice was taken of taxes. o claimed under Stiles, refused to execute a lease e rent was made payable clear of taxes, and Jack- defendant, who claimed under William Jackson, o accept such a lease. Jackson having paid some r land-tax, brought an action in the Court of Pleas for the recovery of it, the plaintiff having o deduct it in the payment of the rent. The cause at Guildhall, before Lord Rosslyn, then Lord tice of the Common Pleas. The defendant was to give parol evidence of the real agreement, and hip gave credit to the veracity of the witnesses, anding which he rejected the evidence, and di- verdict to be given for Jackson, with costs; and, application to the Court of Common Pleas, the proved of the verdict, and refused a rule to show y the same should not be set aside.

branch of the case, therefore, the point was so- ecided in a court of law, and the same determina- afterwards made upon the same case in a court

(*c*) 4 Bro. C. C. 514; 6 Ves. jun. 334, n.

of equity. Rich being defeated at law, filed his bill for a specific performance of the agreement, varied by the parol evidence; and the cause came on to be heard before Lord Rosslyn, then Lord Chancellor, who said, that the prior conversations, and the manner of drawing up the agreement by one party, and signing it by another, would have no influence. The real question was, whether in equity any more than at law, the evidence ought to be admitted; whether there is any distinction in a court of equity, where a party comes to enforce a written agreement by obtaining a more formal instrument, and to add, in doing that, a term not expressed in the written agreement, and of such a nature as to bear against the written agreement. He had looked into all the cases, and could not find that the Court had ever taken upon itself, in executing a written agreement by a specific performance, to add to it by any circumstance that parol evidence could introduce. And he accordingly dismissed the bill, but without costs.

Indeed Lord Rosslyn appears to have made a similar decision in a case prior to that of Rich *v.* Jackson. The case to which I allude is Jordan *v.* Sawkins (*d*); where a bill was filed for a specific performance of a lease, and it was stated, that there was a memorandum annexed to the original agreement, that the tenant (I) was to pay the land-tax (which, it must be presumed, was not signed, and was therefore only tantamount to a parol agreement). The cause was heard before the Lords Commissioners Eyre,

(*d*) Jordan *v.* Sawkins, 3 Bro. C. C. 388; 1 Ves. jun 402; and see O'Connor *v.* Spaight, 1 Scho. and Lef. 305; and see the cases *infra*, as to the *discharge* of a parol agreement.

(I) In the Report, the name of the landlord is, by mistake, printed for that of the tenant.

Almost

nt, and Wilson, who decreed a performance of the
ct with the variation, that it was to be at a clear rent
l. *without deducting land-tax*. The cause was re-heard
Lord Rosslyn, who said, that if the agreement had
carried into execution as it originally stood, the land-
must have paid the land-tax. The Court could not
ically perform an agreement with a variation, and
refore reversed the decree, and dismissed the bill.
a term agreed upon by parol cannot be added to a
n agreement, by a parity of reason a written agree-
cannot be *varied* by parol.
is was decided by Lord Thurlow in a branch of the
mentioned case (*e*). It appeared that a lease was
d, by writing, to be granted of a house for twenty-
ears, to commence from the 21st of April 1791, and
it was afterwards agreed by parol, that the lease
d commence on the 24th of June instead of the 21st
il. To a bill filed by the tenant for a specific per-
mce of the written agreement, varied by the parol
ment, the statute of frauds was pleaded, and Lord
ellor Thurlow held, that the different period of com-
ing the lease made a material variation, as it gave
state from the owner for so many months longer,
herefore he allowed the plea.

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e rule of law is, *nihil tam conveniens est naturali*
ti, unumquodque dissolvi eo ligamine quo ligatum est:
herefore, in general, as we have seen, an agreement
iting cannot be controlled by averment of the parties,
would be dangerous to admit such nude averments
st matter in writing (*f*). This was an imperative

See Robson *v.* Collins, 7 m. 130.

5 Co. 25, b; Blemerhasset *v.* Pierson, 3 Lev. 234.

Countess of Rutland's case.

rule, previously to the statute of frauds; and the statute required that "all agreements upon any contract or sale of lands, &c. should be in writing." Now, as Lord Hardwicke observed, an agreement to wave a purchase contract, is as much an agreement concerning lands as the original contract (*g*); notwithstanding which it is universally considered, that an agreement in writing concerning land may be *discharged*, although it cannot be varied by parol (*h*). And in a late case, where all the authorities were mentioned, but in which it was not necessary to decide the point (*i*), the Master of the Rolls appeared to consider that a written agreement might be abandoned by parol.

The first case on this head, is a short note in Vernon (*k*); where the precise point occurred, and the Lord Keeper held, that the agreement might be discharged by parol, and therefore dismissed the bill, which was brought to have the agreement executed *in specie*. The next case is reported by Viner (*l*). The case was, that *A* leased a house to *B* for eleven years, and was to allow 20*l.* to be laid out in repairs; the agreement was reduced into writing, and signed and sealed by both parties. *B* repaired the house, and finding it to take a much greater sum than the 20*l.* told *A* of it, and that he would nevertheless go on and lay out more money if he would enlarge the term to twenty-one years, or add fourteen, or as many as *B* should think fit. *A* replied, that they would not

(*g*) 2 Eq. Ca. Abr. 33.

(*h*) 1 Ves. jun. 404; 4 Bro. C. C. 519; 6 Ves. jun. 337, n.; 9 Ves. jun. 250; 3 Wooddes. 428, s. iv.; Rob. on Stat. of Frauds, 89; and Inge *v.* Lippingwell, 2 Dick. 469; but see Kaye *v.* Waghorn, 1 Taunt. 428.

(*i*) Price *v.* Dyer, MS. Rolls; S. C. 17 Ves. jun. 356, *post*.

(*k*) Goman *v.* Salisbury, 1 Vern. 240. I could not discover any trace of this cause in the Register's book.

(*l*) Anon. 5 Vin. 522, pl. 38; 4 Geo.

fall

fall out about that, and afterwards declared that he would enlarge the term, without mentioning the term in certain. The question was, whether this new agreement, made by parol, which varied from the written agreement, should be carried into execution, notwithstanding the statute of frauds. The Master of the Rolls said, that before the statute, a written agreement could not be controlled by a parol agreement, contrary to it, or altering it; *but this was a new agreement*, and the laying out the money was a part performance on one part, and ought to be carried into execution, and built his decree on these cases: first, where a parol agreement was for a building lease, and before it was reduced into writing, the lessee began to build, and after differing on the terms of the lease, the lessee brought a bill, and the lessor insisted on the statute of frauds: the Lord Keeper dismissed the bill, but the plaintiff was relieved in *Dom. Proc.*; and the second was a case in Lord Jeffries's time.

Then came the case of Buckhouse and Crosshy, before Lord Hardwicke (*m*), where, to a bill filed by a purchaser for a specific performance, the vendor insisted the contract had been *discharged* by a parol, and the case of Goman *v.* Salisbury was cited by his counsel as an authority in his favour. The Lord Chancellor, under the circumstances, decreed for the plaintiff, with costs; and declared, that though he would not say that a contract in writing would not be waved by parol, yet he should expect, in such a case, very clear proof; and the proof, in the present case, he thought very insufficient to discharge a contract in writing; and observed, that the statute of frauds and perjuries requires that "all contracts and agreements concerning land should be in writing." Now, an agreement to wave a purchase contract is as much an

(*m*) 2 Eq. Ca. Abr. 32, pl. 44; 10 Geo. II.

agreement concerning lands as the original contract. However, he said, there was no occasion now to determine this point.

And, in another case, Lord Hardwicke is reported to have said, that it was certain that an interest in land *could not be parted with, or waved by naked parol, without writing*; yet articles might, by parol, be so far waved, that if the party came into equity for a specific execution, such parol waver would rebut the equity which the party before had, and prevent the Court from executing them specifically (*n*).

The case of Legal *v.* Miller (*o*), comes next in point of time. The agreement was for taking a house at 32*l.* per annum, and part of the agreement was, that the owner should put the house in repair. It was afterwards discovered not to be worth while barely to repair the house, but better to pull it down; and, therefore, without any alteration in the written agreement, the house was pulled down by consent of the tenant, apprised of the great expense it would be to the landlord; and, therefore, an agreement was made by parol only, on the part of the tenant, to add 8*l.* per annum to the 32*l.* The tenant brought a bill for specific performance, on the foot of the written agreement, by which he was to pay only the 32*l.* rent. The defendant, by his answer, set up the parol agreement. Sir John Strange said, such evidence is frequently suffered to be read, especially to rebut such an equity as now insisted on by the bill, as where the agreement is in part carried into execution, parol evidence is allowed to prove that; or *where it is a hard agreement; and the Court may, therefore, decree against the written agreement, as in* 1 *Vern.* 240, *(Goman* v. *Salisbury)*; and the single question being

(*n*) Bell v. Howard, 9 Mod. 302; and see Earl of Anglesea v. Anneley, 4 Bro. P. C. 421.

(*o*) 2 Ves. 299.

here,

ere, whether the Court should decree a specific perform-nce of the agreement, the plaintiff insists upon, and being atisfied, from the parol evidence, that it should not, the Court must dismiss the bill. And in the subsequent case f Pitcairne *v.* Ogbourne (*p*), Sir John Strange referred o this decision, and approved of it.

In the late case of Price *v.* Dyer (*q*), which has already een mentioned, where a parol waver of a written agree-nent was set up as a defence to a specific performance, ir William Grant was of opinion, 1st, that there was not n abandonment of the agreement, but that there was erely a variation; and 2d, that as the variation was ithout a consideration, and had not been acted upon, it as not a good defence to the plaintiff's demand. His Honor, after premising that the original written agree-nent was binding, and had not, in his opinion, been waved, dded, that he inclined to think the effect of a clear bandonment by parol, would be to discharge the written greement. But in the cases cited, the parol agreement ut an end to the transaction, and restored the parties to heir original situation. Here there was a mere variation. The question then was as to the variation. Variations cted upon, as in Legal *v.* Miller, would be a bar; that is a fraud. But his Honor's opinion was, that verbal varia-tions were not a sufficient bar where the situation of the parties, in all other respects, remained unaltered. The defendant had lost nothing; would lose nothing. He had only lost what he had gratuitously gained. His Honor, therefore, decreed a specific performance of the original agreement, but without costs.

I have thought it of great importance to bring all the cases which I have met with, on this point, fully before the reader, who will not fail to perceive, that in every

(*p*) 2 Ves. 375. (*q*) MS. Rolls; S. C. 17 Ves. jun. 356.

case, except that in Viner, the party insisting upon t
parol agreement, was not requiring the aid of the Cou
but merely set up the agreement as a bar to a speci
performance; and therefore, in strictness, these cases
long to the class before discussed, where the Court
admit the evidence to rebut the plaintiff's equity, althou
it would be inadmissible as a ground for relief. In
case in Viner indeed, the person relying on the p
agreement was plaintiff; but the new agreement wa
part performed by him, and the Master of the Rolls
that day, expressly founded his decree on that ground.
No case seems to go beyond that. In the case of Price
and Dyer, the parol agreement was not, under the circumstances, held to be a sufficient *defence.*

Whether an absolute parol discharge of a written agreement, not followed by any other agreement upon which the parties have acted, can be set up even as a defence in equity, seems questionable. The result of the authorities as to a parol variation, appears to be,

1st, That evidence of it is totally inadmissible at law.

2dly, That in equity the most unequivocal proof of it will be expected.

3dly, That if it be proved to the satisfaction of the Court, and be such a variation as the Court will act upon, yet it can only be used as a *defence* to a bill demanding a specific performance, and is inadmissible as a ground to *compel* a specific performance, unless,

4thly, There has been such a part performance of the new parol agreement, as would enable the Court to grant its aid in the case of an original independent agreement, and then in the view of equity, it is tantamount to a written agreement.

In considering the point under discussion, the reader will be careful not to confound the foregoing cases with

the case of Walker *v.* Constable (*r*). There the *original* agreement was a *parol* agreement; and the question was, whether, being abandoned, parol evidence could be given of it. Lord C. J. Eyre held, that the existence and the terms of the agreement must be proved before it could be proved to be abandoned, and upon that it was sufficient to say, that *being in writing* (I) the instrument itself must be produced, and parol evidence of it was inadmissible.

II. The next branch of our subject, although the most trite, is not perhaps, therefore, less difficult. Lord Chancellor Bacon says (*s*), there are two sorts of ambiguities of words, the one is *ambiguitas patens*, and the other *latens*. *Patens*, he adds, is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seems certain, and without ambiguity, for any thing that appears upon the instrument, but there is some collateral matter out of the deed that breeds the ambiguity.

A latent ambiguity may be assisted by parol evidence, because the ambiguity being raised by parol, may fairly be dissolved by the same means, according to the general rule of law. Therefore, if, previously to the statute, a man having two manors, both called Dale, had conveyed the manor of Dale to another, evidence might have been given to prove which manor was intended to pass (*t*), and such evidence is still admissible: this has been repeat-

(*r*) 2 Esp. 659; 1 Bos. and Pull. 306. See Adams *v.* Fairbain, 2 Stark. 277.

(*s*) Max. p. 82; Reg. 23.

(*t*) 2 Ro. Abr. 676, pl. 11; and see Lord Cheney's case, 5 Rep. 68; Altham's case, 8 Rep. 155, a; and Harding *v.* Suffolk, 1 Cha. Rep. 74.

(I) That is, in contemplation of law, for it is not deemed an agreement unless reduced into writing.

edly

edly decided (*u*). So, on the same principle, parol ev is always received, to show what is parcel or not, thing conveyed (*x*).

In some cases a latent ambiguity may be fatal. evidence may be adduced to prove the ambiguity, none sufficiently satisfactory can be offered to e it (*y*). And to render parol evidence admissible in cases, a clear latent ambiguity must be first sho Evidence which merely raises a conjecture is insuffici

But although a latent ambiguity may be aid parol evidence, yet a patent ambiguity cannot be ai extrinsic evidence, because that would in effect be t without deed, what by the law can be passed by dee Of this Lord Chancellor Bacon observes, infinite might be put; for it holdeth generally, that all ami of words, by the matter within the deed, and not the deed, shall be helped by construction, or in som by election, but never by averment, but rather shal the deed void for uncertainty.

In Mansell *v.* Price, personal estate was settled i for Price the defendant, and Catherine his wife, fo lives, and the life of the survivor of them, and th their issue, with a power to the wife to dispose of t part of the monies, to any persons she pleased. S ercised this power by giving the money to Sir E Mansell, in trust to pay 1,000*l.* to *A* when she

(*u*) Jones *v.* Newman, 1 Blackst. 63; 3 Wils. 276; 2 Atk. 239, 240. 373; 1 Bro. C. C. 341.

(*x*) Quaintrell *v.* Wright, Bunb. 274; Longchamps *v.* Fawcett, Peake's Ca. 71; Doe *v.* Burt, 1 Term Rep. 701; Anon. 1 Str. 95; but where there is property to satisfy the words o ill, it cannot be shown by parol evide the testator meant to pass a within the description. S *v.* Oxenden, 3 Taunt. 147.

(*y*) Thomas *v.* Thomas, Rep. 671.

(*z*) See Lord Walpole Earl of Cholmondeley, Rep. 138.

attain twenty-one, or marry; but if she died before twenty-one, or marriage, then it should be to such uses as *B* should appoint. And the other 500*l.* she directed to be paid to *C*, in exactly the same terms as before. The bill was filed by the guardian of *A* and *C*, infants, to have the money paid, and to be put out for them to have the interest thereof immediately. For the defendant Price, it was insisted that he was entitled to the interest of 1,500*l.* until it should become payable. The first question was, whether parol evidence could be admitted to explain the intention of Catherine Price what should become of the interest till the times of payment, for if that could be admitted, there was sufficient to prove the husband should not have it. And the Master of the Rolls was of opinion that such evidence could not be read (*a*).

So in Kelly *v.* Powlet (*b*), the question was, whether plate passed under a bequest of household furniture. The drawer of the will said, it was *not* intended; but his evidence was refused, and the plate was held to pass.

Again, in a case in the Exchequer (*c*), it appeared that by an act of parliament cast plate-glass was directed to be *squared* into plates of certain dimensions. The question was, whether certain plates were in the shape directed by the act. The Attorney-general at the trial produced books explaining the process and terms of art in the manufacture, and the defendants offered evidence to prove the technical meaning in the trade of the word *squaring* glass;

(*a*) MS. T. Term, 8 and 9 Geo. II.; and see Hart *v.* Durand, 8 Anstr. 684; Chamberlaine *v.* Chamberlaine, 2 Freem. 53; Ulrich *v.* Ditchfield, MS. 2 Atk. 372, where the evidence was not received.

(*b*) 1 Bro. C. C. 476, cited; Ambl. 605, reported, which I conceive has overruled Pendleton *v.* Grant, 1 Eq. Ca. Abr. 230, pl. 2; 2 Vern. 517; and see 1 Bro. C. C. 350, 351; Seymour *v.* Rapier, Bunb. 28; Doe *v.* Bland, 11 East, 441.

(*c*) Attorney-general *v.* the Cast Plate-Glass Company, 1 Anstr. 39.

the

the evidence was, however, refused, and a verdict found against the defendants: and upon a motion for a new trial, Lord Chief Baron Eyre said: In explaining an act of parliament, it is impossible to contend that evidence should be admitted, for that would be to make it a question of fact, in place of a question of law. The judge is to direct the jury as to the point of law, and in doing so must form his judgment of the meaning of the legislature, in the same manner as if it had come before him on demurrer, when no evidence would be admitted. Yet on demurrer a judge may well inform himself from dictionaries or books, on the particular subject concerning the meaning of any word. If he does so at *nisi prius*, and shows them to the jury, they are not to be considered as evidence, but only as the grounds on which the judge has formed his opinion, as if he were to cite any authorities for the point of law he lays down.

So parol evidence is inadmissible to restrain the legal operation of general words in an instrument. Therefore it cannot be admitted to prove, that a particular estate was not intended to pass under general words sufficient to comprise it.

Thus in Davis *v.* Thomas (*d*), a husband and wife being seised of settled estates in the county of Pembroke, bought an estate in the same county, called Rigman Hill, which was conveyed to them, and the survivor in fee. The husband having prevailed on the wife to join with him in suffering a recovery of the settled estates, in order to enable him to mortgage them, gave the attorney employed to suffer the recovery, a particular description of the settled estates, which did not comprise Rigman Hill; and it *clearly* appeared from several circumstances, that

(*d*) Reg. Lib. 1757, fol. 33, 34. See Thomas *v.* Davis, 1 Dick. 301, *et infra*.

he

he had not any intention to comprise that estate, the title-deeds of which were in his wife's custody. The attorney, fearful of not comprising the whole estate, and not knowing that Rigman Hill had been purchased, added general words sufficient to comprise that estate. The recovery was suffered to the use of the husband in fee, who afterwards mortgaged the estate by the same description. The husband by his will gave all his estates to his wife for life. She survived him, and after her death the heir at law of the husband brought an ejectment against the persons claiming Rigman Hill, under the wife, which came on to be tried at the April Great Sessions for Pembrokeshire, in 1756. Parol evidence was offered by the defendant, to show that it was not intended to comprise Rigman Hill in the recovery and mortgage; but it was refused, and the plaintiff had a verdict.

So in Shelling *v.* Farmer (*e*), where to a release in pursuance of an award, the plaintiff would have called the arbitrators to prove, that they refused to take into consideration a particular fact, although the award and release contained *general words* sufficient to take in all. Eyre, C. J. would not suffer any evidence to be given to contradict the deed.

And in the very recent case of Butcher *v.* Butcher (*f*), *general words* in a release were held not to extend to a certain bond of indemnity: and Lord Chief Justice Mansfield, at Guildhall, refused to admit parol evidence to show the intention of the releasor to release the bond. And upon a motion for a new trial, the Court of Common Pleas intimated a strong opinion, that no evidence could be admissible to explain the release, since the doubt, if any,

(*e*) 1 Str. 646. See Strode *v.* Lady Falkland, 2 Vern. 621; 3 Cha. Rep. 90; and Goodinge *v.* Goodinge, 1 Ves. 231.

(*f*) 1 New Rep. 113.

was

was *ambiguitas patens*; and in consequence of this i
tion, the counsel for the plaintiff declined arguing th

But, as we shall presently see, the effect of g
words may be restrained in a court of equity, on the g
of mistake, where it is satisfactorily proved.

It still remains to observe, that courts both of la
equity constantly advert to the situation of the p
&c. in order to enable them to construe ambiguous
penned instruments, although parol evidence of
tention of the parties could not be received, and th
been sanctioned by a leading case in the Ho
Lords (*g*).

In one case (*h*), where it was doubtful whether a
nant for renewal extended to a perpetual renewal, a
parties had renewed four times successively under the
nant, Lord Mansfield and the other judges of the
Bench held, that the parties themselves had put
struction upon the covenant, and were therefore bou
it. Lord Alvanley, who was in the cause, said,
Master of the Rolls, that he was never more amaze
at this decision, and that Mr. Justice Wilson, w
gued with him, was astonished at it (*i*); and his Lo
more than once expressed his marked disapprobat
this doctrine (*k*). Lord Eldon (*l*), and the late M
of the Rolls (*m*), have both also dissented from it
Lord C. J. Mansfield, in a late case, observed,

(*g*) Sir John Eden *v.* the Earl of Bute, 7 Bro. P. C. 745. See Countess of Shelburne *v.* the Earl of Inchiquin, 1 Bro. C. C. 338.

(*h*) Cook *v.* Booth, Cowp. 819; and see 1 Blackst. 1249; 1 New Rep. 42. See Peake on Evid. ch. 2.

(*i*) Baynham *v.* Guy's Hospital, 3 Ves. 295; and see 2 V 448.

(*k*) See Eaton *v.* Lyon, jun. 690.

(*l*) See Iggulden *v.* May jun. 325.

(*m*) See Moore *v.* Foley, jun. 232.

was a case which had been impeached upon all occasions (*n*.) And it appears to be now clearly settled, that in the *construction* of an agreement or deed, the acts of the parties cannot be taken into consideration (*o*).

Where, however, the words of an *ancient* statute or instrument are doubtful, *cotemporaneous* usage, although it cannot overturn the clear words of the instrument, will be admitted to explain it; for *jus et norma loquendi* is governed by usage, and the meaning of things spoken or written must be as it hath constantly been received to be by common acceptation (*p*). This has been determined in many cases, and such evidence accordingly received (*q*). And in a late case on this subject, Lord Ellenborough said, it was in constant practice at *nisi prius* to receive evidence of usage to explain doubtful words in old instruments; and it would be difficult to show any just ground of distinction between the information which a judge might receive to aid his judgment in bank and at *nisi prius* (*r*).

III. The last division of our subject relates to the jurisdiction of equity, in correcting mistakes and fraudulent omissions in agreements and deeds (I).

In

(*n*) See 2 New Rep. 452.

(*o*) See Clifton *v.* Walmsley, 5 Term Rep. 564; and see Iggulden *v.* May, 7 East, 237.

(*p*) Sheppard *v.* Gosnold, Vaugh. 169.

(*q*) Rex *v.* Varlo, Cowp. 246; Gape *v.* Handley, 3 Term Rep. 221, *n.*; Blankley *v.* Winstanley, 3 Term Rep. 279; Rex *v.* Bellringer, 4 Term Rep. 810; Rex *v.* Miller, 6 Term Rep. 268; and see Attorney-general *v.* Parker, 2 Atk. 576; Attorney-general *v.* Forster, 10 Ves. jun. 335; Kitchin *v.* Bartch, 7 East, 53; Bailiffs, &c. of Tewkesbury *v.* Bricknell, 2 Taunt. 120.

(*r*) Rex *v.* Osbourne, 4 East 327; and see Stammers *v.* Dixon 7 East, 200.

(I) Even at law the palpable mistake of a word will not defeat the intention of the parties. In a case in the Common Pleas, where the condition

In Henkle *v.* the Royal Exchange Assurance Office (*s*), Lord Hardwicke said, that no doubt but equity had jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds and contracts; so that if reduced into writing, contrary to the intention of the parties, on proper proof that would be rectified; he thought, however, that in these cases there should be the strongest proof possible. In a case which was much agitated before Lord Thurlow, he laid down the rule with great latitude, that if a mistake appears, it is as much to be rectified as fraud (*t*). So in another case before the same Chancellor, he said that he thought it impossible to refuse, as incompetent, evidence which went to prove that the words taken down were contrary to the concurrent intention of all parties. To be sure his Lordship added, it must be strong, irrefragable evidence, but he did not think he could reject it as incompetent (*u*).

Lord Eldon, observing upon these *dicta*, said, that Lord Thurlow seemed to say that the proof must satisfy the Court what was the concurrent intention of all parties;

(*s*) 1 Ves. 317.

(*t*) Taylor *v.* Radd, 5 Ves. jun. 595, cited.

(*u*) Countess of Shelburn *v.* the Earl of Inchiquin, 1 Bro. C. C. 338; and see Cock *v.* Richards, 10 Ves. jun. 441.

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condition of a bond was, that it should be void if the obligor did not pay; and performance being pleaded on the ground of literal expression, the court held the plea bad. Anon. Dougl. 384, cited, 2d edition. See 1 Dow, 147. It seems clearly settled, that words evidently omitted in a will by mistake, may be supplied, both at law and in equity, Tollett *v.* Tollett, Ambl. 194; Coryton *v.* Hellier, 2 Burr. 923, cited; and Doe *v.* Micklem, 6 East, 486; see Lane *v.* Goudge, 9 Ves, jun. 225; Mellish *v.* Mellish, and Philips *v.* Chamberlain, 4 Ves. jun. 45. 51; but however evident the mistake may be, the words will not be supplied if the testator's manifest intention would be defeated by the insertion of them. Chapman *v.* Brown, 3 Burr. 1626. See 2 Ves. jun. 365.

and

d his Lordship added, *it must never be forgot to what tent the defendant, one of the parties, admits or denies :' agreement.* In the case before Lord Eldon (*x*), a ecific performance of an agreement was sought, with a iation attempted to be introduced by parol, on the ound of mistake and surprise, which was positively de- d by the defendant. And his Lordship said, that he uld not say, that upon the evidence without the answer, should not have had so much doubt whether he ought t to rectify the agreement as to take more time to consi- r whether the bill should be dismissed; but as the agree- nt was to be considered with reference to the answer by ich he had positively denied it, his Lordship dismissed e bill, but without costs.

Lord Eldon's decision precisely accords with Lord Thur- w's opinion, which he rightly construed. For in Lord nham *v.* Child (*y*), it was observed by Lord Thurlow, at if a mistake be admitted, the court would not overturn he rule of equity by varying the deed; but it would be an quity *dehors* the deed. Then it should be proved as uch to the satisfaction of the court, as if it were admitted: *'The difficulty of this is so great, that there is no instance f its prevailing against a party insisting there was no istake."*

Where the court cannot satisfy itself of the fact, an issue may be directed to try the question. Thus, in the case of the South Sea Company *v.* D'Oliff (*z*), D'Oliff agreed not to carry goods under certain circumstances; and if information was given in two months after return home that he had done so, he was to pay certain stated damages.

(*x*) Marquis of Townshend *v.* Stangroom, 6 Ves. jun. 328.

(*y*) 1 Bro. C. C. 92; and see Hare *v.* Shearwood, 3 Bro. C. C. 168; 1 Ves. jun. 241; and Haynes *v.* Hare, 1 Hen. Blackst. 659.

(*z*) 2 Ves. 377; 5 Ves. jun. 601, cited; and see Pember *v.* Mathers, 1 Bro. C. C. 52.

The instrument was not drawn up until on board the ship, and in a great hurry, and executed there by D'Oliff; who when he got out to sea, and read it over, found it was six months instead of two; and brought a bill to be relieved against that variation in the instrument, the company having brought an action on it. Lord King sent it to an issue; it was tried on a question, whether it was the original agreement it should be two instead of six months. A verdict was given in favour of the plaintiff, that the agreement was designed to be in two, and in consequence of that, Lord Talbot made a decree to relieve the plaintiff against any difficulty by the variation.

The hesitation with which parol evidence is received in equity to correct even mistakes in agreements and deeds, is strongly exemplified by a case before Sir William Fortescue (*a*). Previously to marriage an estate was agreed to be settled on the intended husband for life, remainder to the wife for life, remainder to the sons successively in tail male, remainder to all the daughters. Instructions were given to an attorney to draw the settlement, who drew it as far as the limitations to the sons, where he stopped, and said, then go on as in Pippin *v.* Ekins; which was a precedent he delivered to his clerk, to go on from that limitation, and was a right settlement to the issue male and daughters by that wife; but the clerk drew the settlement to all the daughters of the husband, without restraining it to that marriage: it was executed with this mistake: the question arose between an only daughter of that marriage and children of the husband's by the second wife. The draft of the attorney was proved, and the

(*a*) Harwood *v.* Wallis, 2 Ves. 195, cited.

settlement

sent in Pippin *v.* Ekins; but the court would not parol evidence of the attorney to be read, and held e other evidence could not do; that nothing appear- writing under the hands of the parties, the settle- could not be altered. And Sir Thomas Clarke is ed to have said (*b*), that as to the head of the mistake, l not give a positive opinion, but he did not think art had relied upon parol evidence singly.

whatever difficulty there may be of admitting parol ce singly, yet it is always admitted where it is orated by other evidence.

s doctrine was carried a great way in the case of oldcot *v.* Serjeant Hide (*c*). Dr. Coldcot having ased church lands in fee, under the title of Crom- sold them to the defendant's testator, and entered neral covenants for the title. Upon the Restoration tate was avoided, and upon an action on the cove- damages to the value of the purchase-money were red. A bill was then filed to be relieved against overy at law, which suggested a surprise upon the iff, in getting him to enter into general covenants, at it was declared by the parties, when the deed ecuted, that it was intended Dr. Coldcot should dertake any further than against himself; and *there ome proof of this declaration*, it was decreed by rd Chancellor and Master of the Rolls, that the dant should acknowledge satisfaction on the judg- *and pay costs*. And the reporter says, a like case s between Farrer *v.* Farrer was heard and decreed the same manner, about six months ago.

se, nearly similar, occurred about eleven years after- s (*d*); but it appeared that all the covenants except

1 Dick. 295. 173; 1 Sid. 238, cited; 14 Car. II.
1 Cha. Ca. 15; 2 Freem. (*d*) Fielder *v.* Studley, Finch, 90.

the one upon which judgment had been obtained at law, were restrained to the acts of the vendor, *and that the vendor sold only such estate as he had.*

This last case was quoted in a case in the Common Pleas before Lord Eldon (*e*), who thought the decision must have been made on the ground of the intent of the parties appearing on the instrument, since that intent, and the consequent legal effect of the instrument, could only be collected from the instrument itself, and not from any thing *dehors.* In a still later case in the same Court (*f*), Lord Alvanley thought, under the circumstances of the case, that the application was made to the Court of Chancery to correct the mistake, in the same manner as applications are made to that Court to correct marriage articles where clauses are inserted contrary to the intent of the parties. It seems clear, however, that the relief in this case was founded on parol evidence *that the vendor sold only such estate as he had,* corroborated as it was by the form of the deed and the subject of the contract. Such evidence was received in the prior case of Dr. Coldcot and Serjeant Hide, and is still clearly admissible.

Thus in Young *v.* Young (*g*), the plaintiff married Lucy, a defendant, and an infant; the husband stated, or drew by way of instructions to his attorney, what the wife's fortune then was, and agreed to add as much to be settled in strict settlement, and likewise stated that the intended wife had a prospect of an additional fortune; to which he agreed, provided it did not exceed 1,000 *l.* to add a like sum, to be likewise settled strictly, and he to have the excess. The settlement was prepared according to the instructions; but the solicitor having, in the margin

(*e*) Browning *v.* Wright, 2 Bos. and Pull. 575.

and Pull. 26.

(*f*) Hesse *v.* Stevenson, 3 Bos. Dick. 303, 304.

(*g*) 1 Dick. 295, cited. See 1

of

of the draft, added double the sum, the settlement was prepared and executed according to that mistake. Parol evidence was admitted to prove the mistake; that is, the settlement was first shown to differ from the written instructions, and parol evidence of the counsel and attorney was then received, to prove the mistake.

This equity was administered in the case of Thomas *v.* Davis before cited (*h*), where it clearly appeared, that the estate in question was not intended to be comprehended in the general words. This appeared from many circumstances, but particularly from the description of the estate given by the husband to the attorney by way of instructions, which described the lands particularly, and did not include Rigman Hill; and the attorney proved that he did not know of this estate, and that he introduced general words, merely to guard against any wrong or imperfect description of the lands actually intended to pass. It was objected, that the admission of the attorney's evidence was in direct contradiction to the statute of frauds; but Sir Thomas Clark was clear it might be read, and accordingly admitted it (I).

So in Rogers *v.* Earl (*i*), instructions were given, pre-

(*h*) *Supra*, p. 1; 140 Dick. 301; Reg. Lib. B. 1757, fol. 33, 34.

(*i*) 1 Dick. 294. Note, the facts are not stated in the report; they are extracted from the Register's book; see Reg. Lib. B. 1756, fol. 205; see Pritchard *v.* Quinchant, Ambl. 147; 5 Ves. jun. 596, n. (*a*); and Barstow *v.* Kilvington, 5 Ves. jun. 593; and see Nelson *v.* Nelson, Nels. Cha. Rep. 7; Shaw *v.* Jakeman, 4 East, 201.

(I) The judgment is very inaccurately stated in the report. After addressing himself to the general words, the Master of the Rolls is stated to have said, Do these words comprise Redmond [Rigman] Hill? I do not think they do include Redmond Hill; but other words do. If Redmond Hill was not intended, why was the wife to join; and why did she join? This is absolute nonsense. The wife joined because she was interested in the settled estates; and the opinion of the Court was, that the general words did include Rigman Hill. The editor's marginal abstract of this case shows how difficult it is to understand the report of it.

viously to marriage, for a settlement of the wife's estate on the husband during his life, if he and his wife should so long live, remainder to the wife for life, remainder to the issue of the marriage in strict settlement, remainder to such uses as the wife should appoint; and a draft of a settlement was drawn accordingly. And after the limitation to the husband it stood thus: And immediately after the decease of the husband, then to the wife, &c.; and proper limitations were inserted to trustees to preserve contingent remainders. When the wife saw the draft, thinking she was past child-bearing, she objected to the limitations to the issue, and they were directed to be struck out. The attorney, by mistake, not only struck out those limitations, but also the limitation to the wife for life, and the subsequent limitation to trustees to preserve, and the deed was executed without the mistake being discovered, whereby, as the bill stated, the said power for appointing the reversion of the premises was made to take place on the decease of the plaintiff generally, though the limitation to him was only during the joint lives. The wife exercised her power by deed, in favour of her husband during his life, and then by will gave him the fee, and then died in his life-time. Her heir at law insisted that the use resulted to him during the husband's life, and that there being no trustee to preserve contingent remainders, the devise in the will as an execution of the power, not taking effect till the determination of the particular estate, was void, and brought an ejectment against the husband, and obtained a verdict (I). The husband then filed a bill for an injunction, and to rectify the mistake in the settlement, The defendant, by his answer, urged that the draft of the settlement might have been altered

(1) The first point at least was clear at law, but the defendant set up an old term as a bar to the plaintiff's right to recover. The defence, however, did not succeed. See Farmer dem. Earl v. Rogers, 2 Wils. 26-

with

a view to support the husband's claim, and insisted
arol evidence could not be received; but Sir Thomas
decreed, that the power appeared to have been de-
so far to extend as to enable her to dispose of the
ts in the estates after the determination of the cover-
nd during the life of her husband, as well as to dis-
f the inheritance of the estates after her husband's
e, and ordered the settlement to be rectified accord-
; but without costs on either side.

he last case upon this subject (*k*), a conveyance of
ion of church tithes upon a purchase was made,
ry to what was considered to be the true construction
written agreement, subject to a proportion of the
eserved by the lease of the tithes; and upon proof
his was done, by the mistake of the *purchaser's* at-
, and that the rent had not been demanded for seve-
ars, the deed was after the lapse of several years rec-
nd made conformable to the written agreement.

. settlement be made contrary to the intention of the
s, merely to prevent a forfeiture (II), parol evidence
issible of the real intent of the parties (*l*), and the
nent will be rectified in conformity with it.

Reb. v. Butterwick, 2 Price,
Harvey v. Harvey, 2 Cha. D, decided the same way, Sir Harbottle Grimston, then by Lord Nottingham, and afterwards by Lord Chancellor Jeffries; and see Fitzgib. 213, 214; see Stratford v. Powell, 1 Ball and Beatty, 1.

In this case the settlement was to prevent the estate from being red on account of the husband having been in arms for Charles . The decree was made in the reign of James his son. So to the *nature* of the forfeiture, it is evident that the relief of equity ot have been afforded, for the purpose of *upholding* the settlement, nder the Restoration!

Where parties omit any provision in a deed, on the impression of its being illegal, and trust to each other's honour, they must rely upon that, and cannot require the defect to be supplied by parol evidence.

Thus in Lord Irnham *v.* Child (*m*), it appeared that Lord Irnham treated with Child for sale of an annuity. Upon settling the terms, it was agreed that the annuity should be redeemable; but both parties supposing that this appearing upon the face of the transaction would make it usurious, it was agreed that the grant should not have in it a clause of redemption; and it was accordingly drawn and executed without such a clause. Lord Thurlow refused to supply the omission. A similar decision was made by Mr. Justice Buller, when sitting in Chancery for the Lord Chancellor (*n*); and two similar determinations were made by Lord Kenyon, when Master of the Rolls (*o*).

Upon these cases Lord Eldon observes, that they went upon an indisputably clear principle, that the parties did not mean to insert in the agreement a provision for redemption, because they were all of one mind that it would be usurious; and they desired the court to do not what they intended, for the insertion of that provision was directly contrary to their intention; but they desired to be put in the same situation as if they had been better informed, and consequently had a contrary intention. The answer is, they admit it was not to be in the deed; and

(*m*) 1 Bro. C. C. 92.

(*n*) Hare *v.* Shearwood, 1 Ves. jun. 241; 3 Bro. C. C. 168. See and consider Haynes *v.* Hare, 1 Hen. Blackst. 659 (I.)

(*o*) Lord Portmore *v.* Morris, 2 Bro. C. C. 219; 1 Hen. Blackst. 663, 664; Rosamond *v.* Lord Melsington, 3 Ves. jun. 40, n.

(I) Perhaps this case does not belong to this line of cases, but should be classed with those in which a term is omitted by mistake; of which *vide supra*.

why

why was the Court to insert it, where two risks had occurred to the parties; the danger of usury, and the danger of trusting to the honour of the party?

But fraud is in equity an exception to every rule. In the case of Lord Irnham *v.* Child, Lord Thurlow distinctly said, if the agreement had been varied by fraud, the evidence would be admissible. If the bill stated that the clause was intended to be inserted, but it was suppressed by fraud, he could not refuse to hear evidence read to establish the rule of equity. Lord Kenyon advanced the same doctrine in the cases before him, and Mr. Justice Buller also thought that parol evidence was, in such cases, admissible (*p*).

The only difficulty in these cases is, to ascertain what shall be deemed fraud. If parties merely agree to a term, and then execute an instrument in which that term is omitted, without objecting to the omission of it, the Court cannot relieve the injured party (*q*). So where a lessor drew a lease for one year, instead of twenty-one, and then read it for twenty-one years, the lessee brought his bill to be relieved; but as he could read, it was deemed his own folly; and as the case was within the statute, his bill was dismissed with costs (*r*). Again, where in a lease the right to enter, cut, and carry away the trees, was reserved to the lessor, the lessee went into parol evidence to show that that was contrary to the original agreement, and proved a conversation previously to the execution of the lease, in which the landlord assured the lessee he should not cut the timber, and only reserved it in order that all his leases might be uniform. The plaintiff's counsel, how-

(*p*) And see Taylor *v.* Radd, 5 Ves. jun. 395, cited; Henkle *v.* R. E. A. Office, 1 Ves. 317; and see Pitcairne *v.* Ogbourne, 2 Ves. 375; Countess of Shelburne *v.* the Earl of Inchiquin, 1 Bro. C. C. 338.

(*q*) See Rich *v.* Jackson, 4 Bro. C. C. 514; *et supra*, p. 129.

(*r*) Anon. Skin. 159.

ever,

ever, gave up this part of the bill at the hearing (*s*), and Lord Rosslyn treated it as clearly wrong. So I am told that in a very recent case at law (*t*), where *a warrant of attorney* was given to confess judgment on the assurance of the creditor that no execution should issue for three years, and execution was, contrary to this parol agreement, issued immediately, the court inclined, that as the defendant knew the contents, and had sufficient time to read the warrants of attorney, they could not relieve; and yet a court of law considers itself to have a considerable controlling power over its own judgments, entered up under warrant of attorney, where the party entering them up has been guilty of a fraud (*u*). The case, however, went off on another ground.

In the Countess of Shelburne *v.* the Earl of Inchiquin (*x*), Lord Thurlow said, if two persons intrust a third person to draw up minutes of their intention, and such person does not draw them according to such intention, that case might be relieved, because that would be a kind of fraud.

And it is said, that in the case of Jones *v.* Sheriffe (*y*), there were heads of an intended lease taken by an attorney in writing; but upon proof that some other clauses were agreed on between the parties at the same time, the Court decreed that those clauses should be put into the lease, notwithstanding the counsel on the other side strenuously insisted on the statute of frauds.

And if either party object to a conveyance, on the ground of the term of the agreement being omitted, and the other party promise to rectify it, whereupon the deed

(*s*) Jackson *v.* Cator, 5 Ves. jun. 688.

(*t*) Gennor *v.* Macmahon, M. T. 1806, B. R.

(*u*) See 1 H. Blackst. 663, 664.

(*x*) 1 Bro. C. C. 350; and see Crosby *v.* Middleton, 3 Cha. Rep. 99; Langley *v.* Brown, 2 Atk. 195; Baker *v.* Paine, 1 Ves. 456.

(*y*) 9 Mod. 88, cited.

is

is executed, a specific performance of the promise will be enforced.

Thus in Pember *v.* Mathers (*z*), a bill was filed for a specific performance of a parol agreement by a purchaser of a lease under written conditions, to indemnify the vendor against the rent and covenants; and it was objected, on the part of the defendant, that the evidence was inadmissible, upon the ground, that where the parties have entered into a written agreement, no parol evidence can be admitted to increase or diminish such agreement. The rule, Lord Thurlow said, was right; but where the objection was originally made, and promised by the other party to be rectified, it comes amongst the string of cases where it is considered as a fraud. Then the evidence is admissible. There being some doubt as to the fact, Lord Thurlow ordered it to go to law upon an issue, whether there was such a promise on the day of the execution of the agreement. Upon the trial, the jury found there was such a promise; and the plaintiff had a decree for a specific performance.

So we have before seen, that where it is stipulated that the agreement shall be reduced into writing, and either party fraudulently prevents the agreement from being put into writing, equity will perhaps relieve the injured party (*a*).

And it is perfectly clear that where fraud is distinctly proved, or the jury infer it from the circumstances, an agreement is invalid at law, as well as in equity (*b*); but the reducing the agreement to writing is, in most cases, an argument against fraud.

(*z*) 1 Bro. C. C. 52; see 14 Ves. jun. 524.

(*a*) *Vide supra*, p. 100.

(*b*) Haigh *v.* De la Cour, 3 Campb. 319; Emanuel *v.* Dane, 3 Campb. 299; Solomon *v.* Turner, 1 Stark. 51.

But

But it must be remarked, that a deed will not be rectified in equity, on the ground of mistake or fraud, to the prejudice of a *bonâ fide* purchaser, without notice.

Thus in the case of Thomas *v.* Davis (*c*), although the lands passed at law, yet as the mistake was clearly proved the words were restrained as between the person claiming under the wife, whose estate was comprised by mistake, and the heir of the husband to whom the estate had passed by the error; but the same equity was not administered against the mortgagee, who was left in possession of the legal right which the generality of the conveyance had invested him with.

(*c*) *Supra*, p. 140; Reg. Lib. B. 1757, fol. 33, 34; 1 Dick. 301.

CHAPTER IV.

OF THE CONSEQUENCES OF THE CONTRACT.

SECTION I.

Of the Rule in Equity, that the Purchaser is entitled to the Estate from the Time of the Contract.

EQUITY looks upon things agreed to be done, as actually performed (*a*), (I); consequently, when a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold (*b*), and the purchaser as a trustee of the purchase-money for the vendor (*c*). Therefore the contract will not be discharged by the bankruptcy of either the vendor (*d*) or vendee (*e*) (II). But

(*a*) Francis's Maxims, max. 13; Com. Eq. ch. 6, s. 9. See Callaghan v. Ward, 1 Ves. 318, cited.

(*b*) Atcherley v. Vernon, 10 Mod. 518; Davie v. Beardsham, 1 Cha. Ca. 9; and Lady Fohaine's case, *ibid.*; and see 1 Term Rep. 95, n.; and Green v. Smith, 1 Atk. 572.

(*c*) Green v. Smith, *ubi supra*; Pollexfen v. Moore, 3 Atk. 272.

(*d*) Orlebar v. Fletcher, 1 P. Wms. 737.

(*e*) See 3 Ves. jun. 255; and Bowles v. Rogers, 6 Ves. jun. and Bea. 545.

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lessee insured his house, the lease expired, and he contracted for lease. Then the house was burned, and the office insisted, that ne of burning it was not the plaintiff's house; but Lord Chanlor, and afterwards the House of Lords, held otherwise. See sses, Dom. Proc. 1730.

to the effect of an extent subsequently to a contract, see Rex Price, 220, cited.

an

an act of bankruptcy, upon which a commission has not issued, will prevent the execution of the agreement, as neither a buyer nor a seller can be assured that a commission may not issue in due time, in which case he could not retain the estate or money against the assignees (*f*).

So the death of the vendor or vendee before the conveyance (*g*) or surrender (*h*), or even before the time agreed upon for completing the contract, is in equity immaterial (*i*).

If the vendor die before payment of the purchase-money, it will go to his executors, and form part of his assets (*k*); and even if a vendor reserve the purchase-money, payable as he shall appoint by an instrument, executed in a particular manner, and afterwards exercise his power, the money will, as between his creditors and appointees, be assets (*l*).

If the estate is under a contract for sale at the date of the will, a devise of it to be sold for a charity, will give the purchase-money to the charity, notwithstanding the mortmain act, as it is called (*m*).

A vendee being actually seised of the estate in contemplation of equity, must, as we shall hereafter see, bear any loss which may happen to the estate between the agreement and conveyance, and will be entitled to any benefit which may accrue to it in the interim (*n*); but, if he obtain

(*f*) Lowes *v.* Lush, Franklin *v.* Lord Brownlow, 14 Ves. jun. 547. 550.

(*g*) Paul *v.* Wilkins, Toth. 105.

(*h*) Barker *v.* Hill, 2 Cha. Rep. 113.

(*i*) Winged *v.* Lefebury, 2 Eq. Ca. Abr. 32, pl. 43; cases cited *ante*, n. (*b*).

(*k*) Sikes *v.* Lister, 5 Vin. Abr. 541, pl. 28; Baden *v.* Earl of Pembroke, 2 Vern. 213; Bebb's case, 2 Freem. 38; Smith *v.* Hibbard, 2 Dick. 712; Foley *v.* Percival, 4 Bro. C. C. 419; and see Gilb. Lex Prætor, 243.

(*l*) Thompson *v.* Towne, 2 Vern. 319. 466.

(*m*) Middleton *v.* Spicer, 1 Bro. C. C. 201.

(*n*) See *post*, ch. 5.

possession

possession of the estate before he has paid the purchase-money, and begin to cut timber, equity will grant an injunction against him (*o*).

If the purchaser was tenant at will of the estate, the contract determines the tenancy. And even if he was tenant for a term certain, the agreement determines the relation of landlord and tenant, and in equity, at least, the landlord cannot call for rent (*p*).

It is a consequence of the same rule, that a purchaser may sell or charge the estate, before the conveyance is executed (*q*); but a person claiming under him must submit to perform the agreement *in toto*, or he cannot be relieved (*r*).

So he may devise the estate, if freehold (*s*), before the conveyance; and if copyhold, before the surrender (*t*); and that, although the estate is contracted for at a future day (*u*), or the contract is entered into by a trustee for him (*x*), and the devisee will be entitled to have the estate paid for out of the personal estate of the purchaser (*y*).

The rule that an estate contracted for may be devised

(*o*) Crockford *v.* Alexander, 15 Ves. jun. 138.

(*p*) Daniels *v.* Davison, 16 Ves. jun. 249.

(*q*) Seton *v.* Slade, 7 Ves. jun. 265; and see 1 Ves. 220; and 6 Ves. jun. 352. Wood *v.* Griffith, 18 Feb. 1818, MS. see *post*.

(*r*) See Dyer *v.* Pulteney, Barnard. Rep. Cha. 160; a very particular case.

(*s*) Darris's case, 3 Salk. 85; Milner *v.* Mills, Mose. 123; Alleyn *v.* Alleyn, Mose. 262; Atcherley *v.* Vernon, 10 Mod. 518; Gibson *v.* Lord Montford, 1 Ves. 485.

(*t*) Davie *v.* Beardsham, 1 Cha. Ca. 39; Nels. Cha. Rep. 76; 3 Cha. Rep. 2; Greenhill *v.* Greenhill, 2 Vern. 679; Prec. Cha. 320; Atcherley *v.* Vernon, 10 Mod. 518; Robson *v.* Brown, Oct. 1740, S. P.; and see 9 Ves. jun. 510.

(*u*) Commissioner Trimnel's case, Mose. 265, cited; and see Atcherley *v.* Vernon, 10 Mod. 518; Gibson *v.* Lord Montfort, 1 Ves. 485.

(*x*) Greenhill *v.* Greenhill, 2 Vern. 679.

(*y*) Milner *v.* Mills, Mose. 123; Broom *v.* Monck, 10 Ves. Jun. 597.

before

before it is conveyed, or surrendered to the purchaser, has now become a land-mark, and could not be shaken without endangering the titles to half the estates in the kingdom. The applicability of the rule to freehold estates has, I believe, never been questioned, but in Ardesoife *v.* Bennet (*z*), where the point arose as to a copyhold estate, Sir Thomas Sewell decided the case on another ground, and appears to have avoided sanctioning the rule in question; and in a manuscript note of this case by the name of Wilson *v.* Bennett, it is said that the Master of the Rolls was of opinion that the copyhold estate did not pass by the will. This opinion was clearly extra-judicial, and cannot be deemed subversive of the numerous cases which have established the contrary doctrine; and, indeed, in a case before Sir Thomas Sewell, a few years after that of Ardesoife *v.* Bennet, he seems to allude to a devise of a copyhold estate contracted for, as sanctioned by practice (*a*).

An estate contracted for will pass by a general devise of all the lands purchased by the testator, although he may have purchased some estates which have been actually conveyed to him, and would therefore of themselves satisfy the words of the will (*b*).

On the other hand, it seems that estates recently purchased *and actually conveyed*, will pass with estates contracted for, by a general devise of all the manors, &c. for the purchase whereof the testator has *already* contracted and agreed (*c*), (I). But a devise of estates "for the

(*z*) 2 Dick. 403; and see 15 Ves. jun. 391, 392, n.

(*a*) Floyd *v.* Aldridge, 1777, 5 East, 137, cited; and see Vernon *v.* Vernon, 7 East, 8.

(*b*) Atcherley *v.* Vernon, 10 Mod. 518.

(*c*) St. John *v.* Bishop of Winton, Cowp. 94; Lofft, 113. 340, S. C.; and 2 Blackst. 930.

(I) This, however, must depend upon the particular circumstances of each case. The case referred to can scarcely be cited as a binding authority establishing a general rule. It seems that the House of Lords was taken by surprise in affirming the judgment.

purchase

rchase whereof the testator has *only* contracted and reed," would not pass estates actually conveyed to him fore the will, unless perhaps they were recently purchased, l the testator had not contracted for any other estate.

If a man possessed of a term of years contract for the rchase of the inheritance, the term, by construction of uity, instantly attends the inheritance; and therefore, a devise of the estate subsequently to the contract, the -simple would pass, although not actually conveyed, l the term as attendant on it (*d*).

And if the purchaser had, previously to the purchase de his will, by a general bequest in which the term uld have passed, yet the legatee will not be entitled to although the bequest be not expressly revoked; because : term, by the construction of equity, attended the inheance immediately on the purchase of the fee, and it must refore follow it in its devolution on the heir or devisee (*e*).

The relation of vendor and purchaser in such a case, en acquired by conveyance of the inheritance, puts an d to the covenants though ever so large and general, ich existed between lessor and lessee (*f*).

The same rule, it seems, must prevail where the term is en *specifically* bequeathed; for if the fee had been actually nveyed, the conveyance would have operated as a revotion (*g*); and as the vendee is seised of the fee in conmplation of equity, although the conveyance be not ecuted, the same rules ought to be adhered to in each ne.

Although the estate may, subsequently to the will, be

(*d*) Per Sir Wm. Grant, *in casu* Capel v. Girdler, Rolls, 16 May 1804, MS.; 9 Ves. jun. 509; Cooke v. Cooke, 2 Atk. 67.

(*e*) Capel v. Girdler, *ubi sup.*

(*f*) See 1 Bligh, 69.

(*g*) Galton v. Hancock, 2 Atk. 424. 427. 430.

conveyed,

conveyed, or surrendered, either to the purchaser (*h*), or to a trustee for him (*i*), yet that will not operate as a revocation of his will (I). The legal estate will of course descend to the

(*h*) Parsons v. Freeman, 3 Atk. 741; Amb. 116; and see 1 Ves. jun. 256; 2 Ves. jun. 429. 602; 6 Ves. jun. 220; 8 Ves. jun. 127; and Prideux v. Gibbin, 2 Cha. Ca. 144.

(*i*) Jenkinson v. Watts, Lofft, 609, reported; cited *nom.* Watts v. Fullarton, Dougl. 718; Rose v. Cunynghame, 11 Ves. jun. 550.

(I) In Brydges v. Duchess of Chandos, 2 Ves. jun. 429, Lord Rosslyn, in treating of this point, said, "Another case is supposed to arise, in which this Court determines upon a principle of equity, it is not said directly against the rule of law, but without attending to what the law would be; that is the case where an equitable estate is devised, and after the will the legal estate is taken, the Court has said that does not revoke the will. It is difficult to state that, at this time of day, in a court of law, which could not look at the equitable interest, but looks only at the legal; but as the legal interest is only a shadow, the justice of the case is very evident; but it is a decision in conformity to the like case at law. The very case occurred at law in Roll. Abr. 616, pl. 3. *Cestui que use*, before the *statute of uses*, devises; afterwards the feoffees made a feoffment of the land to the use of the devisor; and after the statute the devisor dies; the land shall pass by the devise; because, after the feoffment, the devisor had the same use which he had before. That is exactly the case of an equitable estate devised, and a conveyance taken afterwards of the legal estate; and this Court was so far from determining without considering what the rule of law would be, that here is the very point decided by a court of law."

The case referred to is thus stated in Roll;—"*Si home aient feffees a son use devant le statut de* 27 *H.* 8. *ust devise le terre al auter, et puis les feffees font feffment del terre al use del devisor et puis le statut le devisor morust, le terre passera per le devise, car apres le feffment le devisor avoit mesme l'use que il avoit devant.*"

The case then appears to be this. The *cestui que use* made his will, and the feoffees afterwards made a feoffment of the lands to his use; that is, enfeoffed other persons to the use of him. This appears by the reason given for the decision, namely, "because after the feoffment the devisor had the same use which he had before." Whereas, if the facts of the case

heir at law, and he will in equity be deemed a mere trustee for the devisee, unless the devisee thinking the estate

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were as Lord Rosslyn supposed, the devisor would, before the feoffment, have been a mere *cestui que use*, entitled at law to neither *jus in re* nor *jus ad rem*; and after the feoffment he would have been actually invested with the legal seisin of the estate; the case, therefore, seems only to decision, that where a man devises an equitable estate, a transfer of the legal estate to other persons, in trust for him, is not a revocation of his will. And such is still the rule of law (Doe v. Pott, Dougl. 2d edit. 710.) as well as of equity, Jenkinson v. Watts, Lofft, 609.

It may, however, be objected, that the devisor did not die till after the statute of uses; and therefore admitting the force of the foregoing remarks, it still appears that the legal estate was, by the operation of the act, vested in the devisor. To this it may be answered, that the statute was expressly passed to prevent alienation of estates by devise, although it declared that wills made before the statute, by persons who were or should be dead before the 1st of May 1536, should not be invalidated by the statute. We must therefore presume that the devisor died before that time; otherwise the will would have been void by virtue of the act itself, as it is expressly decided in a case where *cestui que use* before the statute devised the use; and then came the statute, which transferred the use to possession; and although the testator survived *the statute of wills*, yet the *operation* of the statute of uses was holden to be a revocation, since *the use was thereby gone*. 1 Rol. Abr. 616, (R.) pl. 2; Putbury Trevalion, Dyer, 142, b.—Indeed the statute of uses could not have come in question in the above case, if the feoffment had been made to the devisor himself.

Lord Hardwicke seems to have construed the case in Reil in the same manner as Lord Rosslyn did, (see Sparrow v. Hardcastle, 3 Atk. 798; and 2 Ves. 234), although he appears to have been struck with the reason given for the decision; in explanation of which, he is in Atkins stated to have said, "The use at law was the beneficial and profitable interest, the use as a trust in equity, and which remained in the same manner after the feoffment as before, and the feoffees there granted the dry legal estate to the devisor." In Ambler, his Lordship is reported to have said, "Thus the law considers two interests in the land; the legal estate, and the use: now the use remains the same at the making the devise, and at the death of the devisor; and therefore accepting the grant of the feoffees makes no alteration in it."

estate did not pass by the will, permit the heir to take the estate, and acquiesce in this for a long while; in which case equity will not relieve him (*j*).

But in analogy to the decisions upon legal estates (*k*) it has been held, that a devise of a freehold estate, contracted for, is revoked by a subsequent conveyance to the usual uses to bar dower (*l*), even where the contract was by parol (*m*), but it is difficult to say in the latter case, that a convey-

(*j*) Davie *v.* Beardsham, 1 Cha. Ca. 39; and see Pigott *v.* Waller, 7 Ves. jun. 98.

(*k*) See Tickner *v.* Tickner, 3 Atk. 742, cited; Kenyon *v.* Sutton, 2 Ves. jun. 600, cited; and Nott *v.* Shirley, *ibid.* 604, n.; and see 2 Ves. jun. 429. 600; 6 Ves. jun. 219; 8 Ves. jun. 115. 211; 10 Ves. jun. 249. 256. See also Luther *v.* Kidby, 3 P. Wms. 170, n. and observe the distinction.

(*l*) Rawlins *v.* Burgis, 2 Ves. and Bea. 382. There was an appeal to the Lord Chancellor, which was for particular reasons withdrawn. It is a point of great interest and nicety.

(*m*) Ward *v.* Moore, 4 Madd. 368. The general point will shortly again come before the Court.

Lord Hardwicke's attempt to reconcile what he conceived to be the decision in this case, with the reason given for it, evinces the impossibility of making them consistent. According to his argument, the equitable interest was not merged by its union with the legal estate, but still subsisted in the contemplation of law.

In the case of Willet *v.* Sandford, 1 Ves. 186, Lord Hardwicke classed the different interests in land into three kinds: First, the estate in the land itself; the ancient common law fee. Secondly, the use; *which was originally a creature of equity*; but since the statute of uses, it draws the estate in land to it; so that they are joined, and make one legal estate. Thirdly, the trust; *which the common law takes no notice of*, but which carries the beneficial interests and profits *in this court, and is still a creature of equity, as the use was before the statute.*

This judicious classification proves (what indeed could not be doubted), that the true principles of this subject were familiar to this great master of equity, and that he was led into a false argument by endeavouring to account for a principle which did not exist.

Upon the point in this note, see further, n. (*a*), to 2 Ves. and Bea. 385, and note (I) to Treat. Powers, 3rd edit. p. 152.

ance

ate to the usual uses to bar dower is not within the contract of the parties. If, however, it were stipulated in the contract that the estate should be conveyed to the purchaser in fee, or to such uses as he should appoint, a conveyance to uses to bar dower, would not, it is apprehended, operate as a revocation of the will.

Estates contracted for *after* the will, will not pass by it (*n*); nor will lands pass by the will, although conveyed to the purchaser subsequent to his will *in pursuance of a contract prior to the will*, unless it was a valid binding contract (*o*). But in these cases the heir at law will be entitled to have the estate purchased for his own benefit, out of the personal estate of his ancestor (*p*), and that, although he unite in himself the three characters of vendor, heir, and executor (*q*). The estate will, however, be assets in the hands of the heir.

So if the purchaser die intestate, the heir will in like manner be entitled to have the estate purchased for him: and if his ancestors die before the conveyance is executed, the heir may devise, charge, or sell the estate, in the same manner as the ancestor himself might have done (*r*).

If the executor complete the purchase, and take the conveyance in his own name, he will be a trustee for the heir or devisee (*s*). And if the assets cannot be got in, and the real representative pay for the land out of his own pocket, he may afterwards call upon the personal estate to reimburse him (*t*). So, if the personal estate is insufficient to

(*n*) Langford *v.* Pitt, 2 P. Wms. 629; Alleyn *v.* Alleyn, Mose. 262; Potter *v.* Potter, 1 Ves. 437; and see 1 Atk. 573; White *v.* White, 2 Dick. 522; Reg. Lib. B. 1775, fol. 650.

(*o*) Rose *v.* Cunynghame, 11 Ves. jun. 550.

(*p*) Milner *v.* Mills, Mose. 123; and see 2 P. Wms. 632; 3 P. Wms. 224; Broome *v.* Monck, 10 Ves. jun. 597.

(*q*) Coppin *v.* Coppin, Sel. Cha. Ca. 28; 2 P. Wms. 291.

(*r*) Langford *v.* Pitt, 2 P. Wms. 629.

(*s*) Alleyn *v.* Alleyn, Mose. 262.

(*t*) See 10 Ves. jun. 614, 615.

perform the contract, and the agreement is on that account rescinded, yet the heir or devisee will, it should seem, be entitled to the personalty as far as it extends. And it has been decided, that if by reason of the complication of the testator's affairs, the purchase-money cannot be immediately paid, and the vendor for that reason rescinds the contract, yet on the coming in of the assets, the devisee of the estate contracted for, may compel the executor to lay out the purchase-money in the purchase of other estates for his benefit (*u*).

But if the heir not being entitled to have the estate paid for out of the personal estate, actually obtain and apply the personal estate in payment of the purchase-money; the persons entitled to the personal estate will not be entitled to the lands, but only to a charge on it for the amount of the money wrongly applied (*w*).

Any codicil executed according to the statute of frauds, will amount to a republication of a prior will of lands; and therefore, if a purchaser, previously to a contract, make a *general devise of all his lands*, and after the contract execute a codicil, according to the statute of frauds, unless an intention appear not to effect it (*x*), the after-purchased estate will pass under the devise in the will, although legacies only are given by the codicil, and no notice is taken of the estate (*y*).

It has been thought that this rule would not apply where the devise in the will is of "the estates of which I am *now* seised;" but the codicil makes the will speak as from the date of the codicil, and therefore there seems to be no solid ground for the supposed distinction.

(*u*) Whittaker v. Whittaker, 4 Bro. C. C. 31; Broome v. Monck, 10 Ves. jun. 597. *Vide infra.*

(*w*) Savage v. Carroll, 1 Ball and Beatty, 265. See *post*, ch. 15, s. 3.

(*x*) Lady Strathmore v. Bowes, 7 Term Rep. 482; 2 Bos. and Pull. 500.

(*y*) Barnes v. Crowe, 1 Ves. jun. 486; Pigott v. Waller, 7 Ves. jun. 98; Goodtitle v. Meredith, 2 Mau. and Selw. 5; Hulme v. Heygate, 1 Mer. 285.

And

And if a purchaser, previously to a contract, by a will duly executed according to the statute, direct his after-purchased lands to be conveyed to the uses of his will, and make a provision for his heir at law, and afterwards die without republishing his will, and the after-purchased lands devolve on the heir at law, equity will put the heir to his election, and not permit him to take both the descended estate, and the provision made for him by the will (*z*).

In purchasing, therefore, of an heir at law who claims an estate conveyed to his ancestor after the date of his will, the purchaser should be satisfied of three points: viz. 1st, That the contract was not entered into by the testator previously to making his will. 2dly, That no codicil was afterwards executed by him, according to the statute of frauds, by which the lands, although not in contemplation, passed. And, 3dly, if the will affects to pass all the estates which the vendor might thereafter acquire, that the heir at law does not take any interest under the will.

And here we may observe, that if a man make a disposition by will of all his copyhold estates, generally, and afterwards purchase other copyhold estates, and surrender them to the uses declared by his will (*a*), or even to the uses declared by his will *of and concerning the same* (*b*), the after-purchased estates will pass under the general devise, although the will was not re-published. Therefore, where a copyhold estate has been surrendered to the use of a will, and the purchaser is buying of the heir at law, who claims in the absence of any devise subsequently to the purchase by

(*z*) Thellusson *v.* Woodford, MS. 13 Ves. jun. 209, affirmed in Dom. Proc.; and see Treat. of Powers, Ch. 6, Sect. 2, Div. II.

(*a*) Heylyn *v.* Heylyn, Cowp. 130; Lofft, 604. This point has since been so decided at *nisi prius*.

(*b*) Attorney-general *v.* Vigor, 8 Ves. jun. 256. See Smart *v.* Prujean, 6 Ves. jun. 565; and the last edit. of Gilbert on Uses, n. (5), p. 72.

his ancestor, he must be satisfied that the estate did not pass under any general devise in a will prior to the purchase.

From the time of the contract, the purchaser, and not the vendor, being owner of the estate in equity, it follows, that if a man devise his estate, and afterwards contract for the sale of it, the devise will thereby be revoked *in equity* (*c*).

And even where an estate was by a will directed to be sold, and the money to be paid to certain persons, and the testator himself afterwards sold the estate, it was held, that the legatees were not entitled to the money produced by the sale (*d*).

If, however, an agreement be such as a court of equity will not carry into execution against the representatives, there seems ground to contend that it will not revoke the will, because the agreement can operate as a revocation in equity only; and, therefore, if equity will not sustain the agreement in respect of which the will is held to be revoked, there appears to be no solid reason why the devise of the estate should not take effect. In Onions *v.* Tyrer (*e*), the Lord Chancellor held, that a second will devising lands to the same person as the former, and revoking all former wills, but not duly executed, should never revoke the former will, so as to let in the heir; *nay, if by the latter will the premises in question had been given to a third person, it should never have let in the heir, in regard the meaning of the second will was to give the second devisee what it had taken from the first, without any consideration had to the heir; and if the second devisee took nothing the first would have lost nothing.*

These principles ought, perhaps, to be referred to the

(*b*) Ryder *v.* Wager, and Cotter *v.* Layer, 2 P. Wms. 332. 623; and see 2 Ves. jun. 436; Vawser *v.* Jeffrey, 16 Ves. jun. 519.

(*d*) Arnald *v.* Arnald, 1 Bro. C.C. 401; 2 Dick. 645.

(*e*) 1 P. Wms. 345. See 7 Ves. jun. 379.

words

words of the statute of frauds (*f*); but still as an agreement is only an equitable revocation, the same reasoning applies to the case before us. Where a man contracts for the sale of his estate, he intends to increase his personal estate, and not to benefit his heir; and if the Court will not carry the agreement into a specific execution for the benefit of the personal estate, "the personal estate takes nothing, and the devisee can have lost nothing."

In the two cases (*g*) in which it has been holden, that an agreement will revoke a will in equity, it makes a term of the proposition, that the agreement amount in equity to a conveyance. And it should seem that Lord Eldon is of this opinion, for in Knollys *v.* Alcock (*h*), where it was contended that an agreement in equity is a revocation only where it can be performed, his Lordship did not deny the rule as stated, but showed, that the agreement in that case was such as equity would perform (*i*), (I), and in Clynn *v.* Littler (*j*), Lord Mansfield laid it down, that covenants had never been allowed to be revocations, *unless where the covenantee has a right to a specific performance.*

Whether an *abandonment* of an agreement will prevent the contract from operating as a revocation of a prior will, seems to be a more doubtful point. In the case of Knollys

(*f*) See Pow. Dev. 641.

(*g*) Ryder *v.* Wager, and Cotter *v.* Layer, *ubi sup.*

(*h*) 7 Ves. jun. 558. There was an appeal from the decision in this case, which has been compromised; and see Mayor *v.* Gowland, 2 Dick. 563. See also 2 Ves. jun. 436.

(*i*) See Savage *v.* Taylor, For. 234.

(*j*) 1 Blackst. 345.

(I) Note. It appears by an abstract of the title to the estate, in respect of which the litigation in Savage *v.* Taylor was commenced, that the heir at law of the testator in his answer to the bill of the devisee insisted, that if the will was originally valid, yet it was revoked by the articles for sale, although the Court ought not to carry them into execution.

v. Alcock,

v. Alcock, before referred to, it was also contended, that an agreement which was abandoned, was not a revocation in equity; but Lord Eldon said, he did not admit that if there is an agreement in equity which at the moment is a completely operative revocation, a subsequent abandonment will of necessity set up the will. His Lordship added, that he did not say whether it would be so or not, for he was of opinion he could not raise the question in the case before him, as the agreement was never abandoned. Sir Wm. Grant upon the same point said, that he very much doubted whether the abandonment of the contract in the testator's life-time, would set up the will without a republication. But where the will is revoked *at the testator's death* by the contract, of course no subsequent event can render the will operative and effectual (*k*). In the first case in the books (*l*), in which the question arose, whether a covenant to convey an estate devised, should operate at law as a revocation of the will, it was holden, that such a covenant without more, was not any revocation of the will; because perhaps the devisor's intention would alter before performance of the covenant. At law, therefore, a contract does not revoke the will; but a conveyance in pursuance of the contract would of course operate as a revocation, or to speak more technically, as an ademption. Now it may be contended, that the same rule must prevail in equity, and that a contract for sale ought not to affect the validity of a prior will, until it is carried into execution, or which in equity is tantamount to a conveyance, until the Court decree a specific performance of it. While an agreement rests *in fieri*, and the validity of it has not been acknowledged by a decree, it seems equitable that the owner should be at liberty, with the concurrence of the other party, to alter his mind. Indeed in the ab—

(*k*) Bennett *v.* Lord Tankerville, 19 Ves. 170.

(*l*) Montague *v.* Jeffries, 1 Bro. Abr. 615, (P.) pl. 3.

sence of intention, there seems to be no weighty distinction between an agreement which has been abandoned, and an agreement which equity will not perform. If a man make a second will without expressly revoking the first, and afterwards cancel the second will, the first is revived, the second will being considered only intentional (*m*); and although it is true that a will is ambulatory till the death of the testator, yet the same ground may be taken in support of a will impliedly revoked by an agreement afterwards abandoned. Why should not a mere agreement be deemed ambulatory till it is completed, when it is clear that the parties may rescind the agreement, and the estate of the devisor is not altered so as to effect a revocation at law?

The seller after the contract and before the conveyance is not considered so absolutely a trustee as to prevent the estate from passing by a devise, subsequently to the contract, of his real estate to trustees to sell (*n*). But where it is devised expressly by name, it has been held that the legal estate only passed to enable the devisee to carry the contract into execution, and the devisee is not entitled to the purchase money beneficially (*o*). The principle of this decision will necessarily furnish many exceptions to the rule laid down in the case of Wall *v.* Bright.

When an estate is contracted to be sold, it is in equity considered as converted into personalty from the time of the contract (I); and this notional conversion takes place,

(*m*) Goodright *v.* Glazier, 4 Burr. 2512.

(*n*) Wall *v.* Bright, 1 Jac. and Walk. 494.

(*o*) Knollys *v.* Shepherd, 1 Jac. and Walk. 499, cited.

(I) The decision in the case of Foley *v.* Percival, 4 Bro. C. C. 419, seems to depend on the personal estate having been charged with the legacies; and the *dictum* of the Lord Chancellor, that an estate contracted to be sold, is not converted into personalty, where it will disappoint the testator's intention as to the payment of legacies charged upon the estate by his will, appears not to be warranted by either principle or authority. The case of Comer *v.* Walkley, 2 Dick. 649, is misreported. See *post*. ch. 9.

although

although the election to purchase rests merely with the purchaser (*p*).

Thus in a case before Lord Kenyon, at the Rolls (*q*), Whitmore demised to Douglas for seven years, with a covenant, that if the tenant, after the 29th of September 1761, and before the 29th of September 1765, should choose to purchase the inheritance for 3,000*l.* Whitmore would convey to him (I). In 1761, before any election, Whitmore died, and left all his real estate to Bennett in fee, and all his personal estate to Bennett and his sister equally. In 1765, before the time mentioned, Waller, who purchased the lease and benefit of the agreement from Douglas, called on Bennett to convey for 3,000*l.*; which conveyance was made in consideration of that sum. Afterwards the sister and her husband filed a bill against the representative of Bennett, claiming a moiety of the 3,000*l.* and interest, and it was decreed accordingly.

This case has been recently followed by Lord Eldon (*r*). But it must be observed, that until the option is declared, the rents belong to the heir or devisee.

Upon the same principle it has been determined, that if a man having a timber estate, agree to sell a given quantity per annum to be chosen by the buyer, although the owner die, and the option is in the buyer, yet the timber cut after the owner's death, however large in quantity, will be part of his personal estate (*s*).

The rule established by these decisions must frequently

(*p*) Lawes *v.* Bennett, 7 Ves. jun. 436; 14 Ves. jun. 596, cited; S. C. cited 16 Ves. 253, 254, *nom.* Douglas *v.* Whitrong; Ripley *v.* Waterworth, 7 Ves. jun. 425.

(*q*) Whitmore's case, *ubi sup.*

(*r*) Townley *v.* Bedwell, 14 Ves. jun. 591.

(*s*) See 7 Ves. jun. 437.

(I) As to rights of pre-emption given by will, and the mode in which they will be carried into execution, see Earl of Radnor *v.* Shafto, 1[illegible] Ves. jun. 448; as to a right of pre-emption of timber, which a lessee is authorised to cut down, see Goodtitle *v.* Saville, 15 East, 87.

subve[illegible]

subvert the vendor's intention; where, therefore, a vendor intends the estate, as between his real and personal representatives, to be deemed real estate, a declaration to that effect should be inserted in the agreement for sale.

Disputes also often arise between the real and personal representatives, where a person purchases an equity of redemption; the real representative mostly claiming to have the mortgage money paid off out of the personal estate, and the personal representative resisting the demand. Unless the mortgage money form part of the consideration money for the estate, or the purchaser, by communication with the mortgagee, clearly take the mortgage debt on himself, as between his heir and executor, it will be considered a charge on the land; the mere covenanting with the mortgagor to pay the debt, will not make it his personal debt; and consequently his personal estate, as between the heir and executor, will only be the auxiliary fund for payment of it (*t*).

In cases of this nature equity always adverts to the intention of the purchaser, and disputes on this subject may therefore be prevented, by the insertion of a short declaration in the purchase-deed, whether the personal estate of the purchaser shall or shall not, as between his heir and executor, be the primary fund for payment of the mortgage money.

But (to return to the point under consideration) if upon the death of the vendor a title cannot be made (I), or there

(*t*) On this point see Evelyn *v.* Evelyn, 2 P. Wms. 659; and the cases in Mr. Cox's note; to which add, Hamilton *v.* Worley, 2 Ves. jun. 62; Woods *v.* Huntingford, 3 Ves. jun. 128; Buller *v.* Buller, 5 Ves. jun. 517; Waring *v.* Ward, 5 Ves. jun. 670; and 7 Ves. jun. 332; and Lord Oxford *v.* Lady Rodney, 14 Ves. jun. 417.

(I) But if the purchaser himself is alive, he may elect to take the estate, Western *v.* Russell, 3 Ves. and Bea. 187.

was

was not a perfect contract, or the Court should think the contract ought not to be executed, in all these cases there is no conversion of real estate into personal in consideration of the Court, upon which the right of the executor on the one hand, and of the heir or devisee on the other, depends; and therefore the estate will go to the heir at law of the vendor, in the same manner as if no contract had been entered into (*u*), and the heir or devisee of the purchaser will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him (*v*). The Court cannot speculate upon what the deceased party would or would not have done; but, in these cases, the inquiry must be, whether at his death a contract existed, by which he was bound, and which he would be compelled to perform. That alone can give the heir of the purchaser a right to call for the personal estate to be applied, or to the personal representative of the vendor, a right to call upon his heir. The question must be the same, whether a purchase or a sale is insisted on. Was the ancestor himself bound? Was there such an agreement as converts the real estate into personal, or the personal estate into real? (*w*) (I). On this ground it has been

(*u*) Lacon *v.* Mertins, 3 Atk. 1; Attorney-general *v.* Day, 1 Ves. 218; Buckmaster *v.* Harrop, 7 Ves. jun. 341; and see 8 Ves. jun. 274; Rose *v.* Cunynghame, 11 Ves. jun. 550.

(*v*) Green *v.* Smith, 1 Atk. 573; Broome *v.* Monck, 10 Ves. jun. 597; Savage *v.* Carroll, 1 Ball and Beatty, 265. *Vide supra.*

(*w*) *Per* Sir Wm. Grant, 7 Ves. jun. 344, 345.

(I) *Vide supra*, p. 115. Note. in Potter *v.* Potter, 1 Ves. 438, a bill was filed to compel execution of the parol agreement in the testator's life-time; his agent gave a note for payment of part of the purchase money, and *let the estate as he pleased.* Possession of the estate must, therefore, have been delivered to him. And the Master of the Rolls expressly said, that the agreement was so far carried into execution, even before the will, as to supply the want of writing. This case, therefore, like the others, only proves, that a *binding* contract in the testator's life-time will be enforced.

decided, that where a man had a right of pre-emption of an estate under a will, and did not accept the offer in his life-time, or denote any intention by his will to do so, there was no subsisting contract, by virtue of which the right passed to the real representative, so as to enable him to call upon the personal estate to pay for the estate, as if it had been contracted for (*x*). So where upon a parol treaty, the purchaser filed his bill for a specific performance of it, and the vendor submitting to perform it, a decree was made, that the purchaser should pay the money into the Bank by a given day, or the bill should be dismissed: and the purchaser paid the money according to the decree; in a question between his heir and devisee it was determined, that the estate did not pass by a general devise in his will, which was made *prior* to the payment of the money (*y*). It will be observed, that in this case, neither of the parties was bound at the time the bill was filed; and if the purchaser had not paid the money, his bill would have been dismissed, and, in that event, no contract would ever have existed. It was therefore clear, that the inception of the contract was upon payment of the money, and the will, therefore, having been made *before* the contract, could not affect the estate.

But if an estate directed to be bought, but not actually contracted for, is not, or cannot be bought, yet the money must be laid out in other lands, for the benefit of the devisee (*z*). And where a testator intends that the devisee of the contracted estate shall have another estate of equal value, in case a good title cannot be made to the one contracted for, an express declaration to that effect should be inserted in the will.

(*x*) Earl of Radnor *v.* Shafto, 11 Ves. jun. 448.

(*y*) Gaskarth *v.* Lord Lowther, 12 Ves. jun. 107.

(*z*) Whittaker *v.* Whittaker, 4 Bro. C. C. 31; and see 2 Atk. 369; Broome *v.* Monck, 10 Ves. jun. 597. *Vide supra.*

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By this time we must have observed, that the foregoing rules, as to the conversion of the estate, apply to those cases only where a court of equity will decree a specific performance: for if equity will not interfere, and the vendee be left to his remedy at law, the rules of law, and not those of equity, must then prevail, and consequently neither the vendor nor his heir would be considered as a trustee for the purchaser, but would only be subject to an action for breach of contract.

SECTION II.

Of Specific Performance.

THE preceding observations lead us to inquire, in what cases a court of equity will decree a specific performance; which, for the purposes of this work, may be comprised under two heads. First, with respect to the vendor. Secondly, with respect to the agreement itself.

I. First, then, if a man, seised in fee-simple, or *pur. autre vie* (*a*), contract for the sale of his estate, and die before the conveyance is executed, his heir at law will be decreed to perform the agreement *in specie*, although he covenanted for himself only, and not for his heirs (*b*).

But, if the heir at law be an infant, it appears by some

(*a*) Stevens *v.* Baily, 2 Freem. 199, cited; Nels. Cha. Rep. 106. reported; see Anon. 2 Freem. 155.

(*b*) Gell *v.* Vermedum, 2 Freem. 199.

authorities (*c*) that he will not be deemed a trustee for the purchaser within the 7th Anne, c. 19; because, it is said, the act does not extend to trusts raised by the construction of equity, and, consequently, no conveyance can be obtained until the infant attains twenty-one.—On examination of the authorities, it will, however, appear, that the provisions of the act have been extended to a much more objectionable case, and that this construction owes its origin rather to inadvertence than principle.

In a modern case, in which this point arose (*d*), a man devised his estate, and afterwards contracted for the sale of it, but died before the contract was carried into execution, leaving an infant heir at law; and, according to the report, Lord Thurlow, *upon consideration*, declared the infant was a trustee within the act of Anne, and directed him to convey to the purchaser, the will of the vendor not having been proved and established against the heir at law; which, it appears from the original papers in the cause, was owing to the inattention of the solicitor who attended the execution of the commission.

This case, as reported, is a direct authority that an infant heir at law, who by construction of equity is a trustee for a purchaser, is also a trustee within the statute of Anne. The decision being of great importance, and the accuracy of the book in which it is reported being very questionable, I traced the cause in the register's book, and have been favoured with a perusal of the original papers in the suit. In the copy of the decree in this case, and in the decree as entered in the register's book, it is observable, that no notice is taken of the infant; but it merely contains the

(*c*) See *Ex parte* Vernon, 2 P. Wms. 549; Sikes *v.* Lister, 5 Vin. Abr. 541, pl. 28; Goodwin *v.* Lister, 3 P. Wms. 387; S. C. MS.; Hawkins *v.* Obeen, 2 Ves. 559; Fearne's *Posthuma*, 236; Jerdon *v.* Foster, 1 Sand. on Uses, 283, cited, 3d edit.

(*d*) Smith *v.* Hibbard, 2 Dick. 730.

usual

usual direction, " that all proper parties, as the Ma shall direct, do join in conveying, &c." It appears, h ever, by the register's book, that upon motion the dec was varied, by omitting the direction, that Smith, as at law, should convey, and that all other necessary par should also convey, and by inserting the usual direct " that all necessary and proper parties, as the Master s direct, do convey;" which proves that the decre correctly stated in Dickens.

I have not been able to learn whether Lord Thur altered his opinion, or upon what ground the decree varied; but it seems to have been occasioned by the possibility of obtaining a conveyance from the heir at l who went to the East Indies very young, and had not b since heard of. The conveyance was not executed many years after the decree, when the heir at law, if was alive, must have been between thirty and forty y of age; but he was supposed to be dead, and another son joined in the conveyance, as the heir at law of vendor. The presumption, therefore, is, that Lord T low continued of the same opinion, but varied the dec for the convenience of the parties: and it is to be ho that his Lordship's decision will be followed in fu cases. For notwithstanding Lord Talbot's doubt (*e*), it been decided, that an infant may convey under the sta of Anne, in pursuance of a decree of the Court (*f*); an is a simple act of legislation to declare, as Lord Kin reported to have done, that he would in the case be him hold the statute to apply to constructive trusts, that he never would do so in future (*g*). If the C were, in cases of this nature, to require a bill to be fi

(*e*) Goodwin *v.* Lister, 3 P. Wms. 387; S. C. MS.

(*f*) Oneby *v.* Price, Fearne's *Pos.* 239; and Hawkins *v.* Ol 2 Ves. 559.

(*g*) See Goodwin *v.* Lister.

the interests of the infant would be before the Court, and could be taken care of. If, on the contrary, Lord Thurlow's decision be not attended to, the most serious inconvenience must frequently ensue, inasmuch as the purchaser would be at liberty to rescind the contract (I).

An agreement by a man seised in tail is, of course, binding on himself, but it cannot be enforced against the issue in tail, if no fine or recovery was levied or suffered, although the ancestor covenanted for that purpose (*h*), and received part, or even the whole of the purchase money, and a decree was made against him to levy a fine, or suffer a recovery; and he died in contempt, and in prison, for not obeying the decree (*i*): the ground of which determinations is, that the issue in tail claim *per formam doni*, from the creator or author of the estate tail; and therefore, though in the power of tenant in tail by a particular conveyance, that not being done, the Court cannot take away the right they derive, not from the tenant in tail, but from the author of the estate tail (*k*).

A distinction has, however, been taken, where the ancestor is only equitable tenant in tail; and the Court will

(*h*) Cavendish *v.* Worsley, Hob. 203; Ross *v.* Ross, 1 Cha. Ca. 171; Sayle *v.* Freeland, 2 Ventr. 350; Jenkyns *v.* Keymes, 1 Lev. 237; which have overruled the *dictum* in Hill *v.* Carr, 1 Cha. Ca. 294.

(*i*) Powell *v.* Powell, Prec. Cha. 278; Weal *v.* Lower, 2 Vern. 306, cited; Sangon *v.* Williams, Gilb. Eq. Rep. 104, cited; and see 1 Ves. 224.

(*k*) See 2 Ves. 634.

(I) *Ex parte* Knight. Lady Teynham *v.* Head, 21 January 1799, Chan. Two daughters devisees in fee. The estate was sold under a decree for payment of testator's specialty debts. The surviving daughter, and two sons, coheirs in gavelkind of the other, were made conveying parties in the conveyance to the purchaser. One son died without having executed the conveyance, leaving an infant heir, who was decreed to be a trustee for the purchaser, and conveyed accordingly.

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in that case, it is said, relieve against the issue (*l*), because equitable estates tail are mere creatures of the Court, and not within the statute *de donis*; and there certainly seems ground to contend that the Court would compel a specific performance against equitable issue in tail, where a decree has been made in the ancestor's life-time. But as late authorities (*m*) have settled that an equitable estate tail in freeholds cannot be barred by a mere deed, but only by a fine or recovery, it seems that equity could not consider such issue to be bound by a mere agreement entered into by their ancestor.

The same observations seem to apply to legal and equitable estates tail in copyholds, for a legal entail can only be barred according to the custom of the manor of which the copyhold estate is holden; and perhaps the better opinion is, that the same steps must be taken to bar an equitable estate tail in copyholds, as must be pursued in the case of a legal entail. Lord Hardwicke, however, appears to have thought (*n*) that a mere surrender was in every case sufficient to bar an *equitable* estate tail in copyholds; but the contrary opinion is entertained by the profession, and appears to be authorized by a case cited in several books from the papers of the late Mr. Powell (*o*), in which it was held, that a covenant by a tenant in tail in equity of a copyhold, in his marriage settlement, to surrender his a

(*l*) Norcliffe *v.* Worsley, 1 Cha. Ca. 234; Sayle *v.* Freeland, 2 Ventr. 350; and see 1 Pow. Contr. 126.

(*m*) Legate *v.* Sewell, 1 P. Wms. 91; Harvey *v.* Parker, 10 Vin. Abr. 266, pl. 6, affirmed in *Dom. Proc.*; Kirkham *v.* Smith, Ambl. 318; Radford *v.* Wilson, 3 Atk. 815; Boteler *v.* Allington, 1 Bro. C. C. 72; Burnaby *v.* Griffin, 3 Ves. jun. 266; and see Fletcher *v.* Tollet, 5 Ves. jun. 13.

(*n*) Radford *v.* Wilson, 3 Atk 315; and see the judgment of Lor Chancellor Apsley, in Grayme Grayme, 1 Watk. Cop. 180; an see Pow. Contr. 126. See Pulle *v.* Lord Middleton, 9 Mod. 483.

(*o*) Hale's case, Ch. 11th De 1764; and see Roe *v.* Lowe, Henry Blackst. 446.

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copyholds to uses in strict settlement, was not of itself sufficient to dock the equitable entail; for if such an entail be created, a recovery in the court baron is necessary to dock it; *it being a rule, that the same steps must be taken to bar an equitable estate in tail, as would be requisite to bar it, were it a legal estate tail* (*p*), (I).

Indeed the power of tenants in tail, to bind their issue, ought to be the same, whether the estate be freehold or copyhold, and whether the entail be legal or equitable; the analogy preserved between legal and equitable estates tail, and between limitations in freehold and copyhold estates, ought to be adhered to in this instance.

Where by the custom of a manor, and it is the custom of most manors, a tenant is complete master of his estate, independently of his wife, and can by his own act alone bar her free bench; an agreement by him for sale of his estate will be enforced against the wife, if he die before it is carried into execution (*q*).

But an agreement for sale of a freehold estate could not be carried into execution against a widow entitled to dower. The distinction is founded upon this ground; that a husband has it in his power, during his life, to sell his copyhold estates, and thereby bar his wife's expectancy; but if a wife's right to dower once attaches on a freehold estate, no act of the husband's alone can divest it.

(*p*) And see 1 Watk. Copyh. 181; 1 Preston on Convey. 155.

(*q*) Hinton *v.* Hinton, 2 Ves. 631. 638; Ambl. 277; Brown *v.* Raindle, 8 Ves. jun. 256, which overruled Musgrave *v.* Dashwood, 2 Vern. 45. 63.

(l) Note; this appears to be an extract from Mr. Booth's opinion on this case. The case itself appears to have been decided on the ground that the remainder-man claiming in equity under the covenant for the settlement, was a mere volunteer.

Equity will enforce an agreement by a joint tenant for sale of his share against the survivor, if the articles amount to an equitable severance of the jointure (*r*): and a covenant to sell, though it does not sever the joint tenancy at law, will in equity (*s*).

An agreement by a *feme covert* for sale of her estate, cannot be enforced either at law or in equity (*t*), unless the estate be settled to her separate use, so as to enable her to dispose of it as if she were sole; nor will an agreement by her husband bind her (*u*). Of the incapacity of a married woman, or her husband, to bind her real estate, unless by a fine or recovery, there is a striking instance in the year books in the reign of Edward the fourth (*x*). A woman *cestui que use* and her husband joined in the sale of her estate; the wife received the money, and she and her husband begged her feoffee to convey the estate to the purchaser, which he accordingly did. The husband died, and then the wife filed a bill against the feoffee for a breach of trust. The cause was heard in the Exchequer Chamber, before the Chancellor and the judges of both benches, who held, that the sale was in fact the sale of the husband; that the receipt of the money by the wife was immaterial, and the sale was void; that the trustee was answerable for the breach of trust; and as the purchaser knew he was buying a married woman's estate, that the wife might recover the estate from him.

If, however, an husband agree to convey his wife's estate, he will, according to some cases, be compelled to

(*r*) Musgrave *v.* Dashwood, 2 Vern. 45. 63. See 2 Ves. 634.

(*s*) See 3 Ves. jun. 25~; Frewen *v.* Relfe, 2 Bro. C. C. 220.

(*t*) Emery *v.* Wase, 5 Ves. jun. 846.

(*u*) See Daniel *v.* Adams, Ambl. 495; 1 Eq. Ca. Abr. 62, pl. 2 side note, which correct the *dictum* in Baker *v.* Child, 2 Vern. 61.

(*x*) 7 E. IV. 14, b.

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perform the agreement *in specie* (*y*); because it has been said, it is to be presumed that the husband, where he covenants that his wife shall levy a fine, has first gained her consent for that purpose (*z*); but this does not seem to be the true ground, for although the wife swear by her answer that she never assented to the agreement, yet the husband will not be let off (*a*). The principle upon which the Court proceeds, seems to be this, that if a person undertakes that another shall do a certain act, he is bound to procure him to perform it; and, therefore, where a father covenanted that his son, who was then under age, should convey lands to a purchaser, he was decreed to procure the son to convey on his coming of age (*b*), (I).

There have been instances of committing the husband to the Fleet, until the wife should convey the estate; but if he should make it appear, that he could not prevail on his wife to join, it seems that he must of necessity be discharged, upon placing the vendee in the same situation as if the agreement had never been executed (*c*).

In a late case (*d*) Lord Eldon seemed of opinion, that

(*y*) Hall *v.* Hardy, 3 P. Wms. 187; Barrington *v.* Horne, 2 Eq. Ca. Abr. 17, pl. 7; Morris *v.* Stephenson, 7 Ves. jun. 474. See Wheeler *v.* Newton, Prec. Cha. 16; Haddon's case, Toth. 205; and see Griffin *v.* Taylor, *ib.* 106; edit. 1649.

(*z*) Winter *v.* Devreux, 3 P. Wms. 190, n. (B.)

(*a*) Wihers *v.* Pinchard, 7 Ves. jun. 457, cited.

(*b*) Anon. 2 Cha. Ca. 53.

(*c*) See note to Hall *v.* Hardy, 3 P. Wms. 187; Ortread *v.* Round, 4 Vin. Abr. 303, pl. 4; 8 Ves. jun. 510; and Emery *v.* Wase, 6 Ves. jun. 846; and see Sedgwick *v.* Hargrave, 2 Ves. 57.

(*d*) Emery *v.* Wase, 8 Ves. jun. 505, and see 16 Ves. jun. 367; Howell *v.* George, 1 Madd. 1.

(I) And it is no plea to an action at law for breach of the agreement, to say, that the third person had nothing to do with it, or no estate in it, for the defendant hath undertaken to procure it, and must at his peril.—Staughton *v.* Hawley, M. 1 W. and M. Rot. 662, B. R. judgment in H. after. MS.

if this alarming doctrine were perfectly *res integra*, he should hesitate before he would hold the husband bound to procure the wife to join. His Lordship said, that if a man chooses to contract for the estate of a married woman, or an estate subject to dower, he knows the property is her's altogether, or to a given extent. The purchaser is bound to regard the policy of the law; and what right has he to complain, if she who, according to law, cannot part with her property but by her own free will, takes advantage of the *locus pœnitentiæ:* and why is he not to take his chance of damages against the husband? And after showing the absurdity which must arise by adhering to the contrary doctrine, his Lordship added, that there was difficulty enough to make him pause, before he should follow the two last authorities; and he was not sure, whether it was not proper to have the judgment of the House of Lords, to determine which of the decisions on this point ought to bind us.

And it now seems perfectly clear, that this jurisdiction is to be very sparingly exercised (I), and that equity will eagerly seize on any reasonable ground as a bar to the aid of the Court (*e*). Indeed in a late case (*f*) in the Court of Common Pleas, where an action was brought on a covenant by a husband, that he and his wife would levy a fine, and he could not procure her concurrence, the learned Chief Justice said, that the covenant upon which the action was brought was such as the Court of Chancery would not now enforce; and he added, that nothing could be more absurd

(*e*) See Ortread *v.* Round, 4 Vin. Abr. 203, pl. 4; Emery *v.* Wase, *ubi sup.*; Daniel *v.* Adams, Ambl. 495.

(*f*) Davis *v.* Jones, 1 New Rep. 267.

(I) Upon this expression Lord Eldon observes, that certainly it is very satisfactory to be informed, that it is and it is not to be done. 8 Ves. jun. 516.

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than to allow a married woman to be compelled to levy a fine, through the fear of her husband being sued and thrown into gaol, when the general principle of the law is, that a married woman shall not be compelled to levy a fine. This observation of Lord Chief Justice Mansfield must have considerable influence on this subject, although, as we have seen, it is not settled, that equity will, *in every case*, refuse to compel the husband to procure his wife's concurrence.

An agreement by a lunatic cannot of course be carried into a specific execution; but the change of the condition of a person entering into an agreement by becoming lunatic, will not alter the right of the parties; which will be the same as before, provided they can come at the remedy. As if the legal estate is vested in trustees, a court of equity will decree a specific performance; and the act of God will not change the right of the parties; but if the legal estate be vested in the lunatic himself, that must prevent the remedy in equity, and leave it at law (*g*), (I); unless the purchaser is satisfied with the enjoyment of the estate which a decree will give him, and chooses to encounter the inconvenience of leaving the legal estate outstanding in the lunatic, in which case a specific performance will be decreed in his favour (*h*).

If trustees, under a power of sale, make a legal contract for sale of the estate, the contract binds the estate; and though, by the deaths of parties, the power should be

(*g*) Owen v. Davies, 1 Ves. 82. (*h*) Hall v. Warren, 9 Ves. jun. 605.

(I) It is much to be regretted, that the late act of 43 Geo. III. c. 75, did not provide for this case, by enabling the committee to convey, under the direction of the court, on payment of the purchase money.

extinguished,

extinguished, yet the contract must be executed by those who have got an interest by the extinguishment of the power (*i*).

II. Secondly, We are to consider the rules by which equity is guided in granting a specific performance, with reference to the agreement itself.

We shall, in the subsequent chapters of this treatise, have occasion to consider rather at large in what cases equity will or will not enforce a specific performance of an agreement for sale of an estate; and it will in this place, therefore, be sufficient to state the *general* rules by which equity is guided in compelling the specific performance of agreements.

The original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground the Court, in a variety of cases, has refused to interfere where from the nature of the case the damages must necessarily be commensurate to the injury sustained (*k*), as for instance, in agreements for the purchase of stock, it being the same thing to the party, where or from whom the stock is purchased, provided he receives the money that will purchase it. These cases show what were the grounds on which courts of equity first interfered, but they have constantly held that the party who comes into equity for a specific performance, must come with perfect propriety of

(*i*) Mortlock *v.* Buller, 10 Ves. jun. 292; and see Shannon *v.* Bradstreet, 1 Scho. and Lef. 52.

(*k*) Errington *v.* Annesley, 2 Bro. C. Ca. 341; Flint *v.* Brandon, 8 Ves. jun. 363; Mitf. Pl. 109.

otherwise they will leave him to his remedy at

ecreeing a specific performance is a matter of dis-
ut it is not an arbitrary, capricious discretion; it
regulated upon grounds that will make it judi-

And undoubtedly every agreement, of which
uld be a specific execution, ought to be in writ-
in, and fair in all its parts, and for adequate
tion (*n*).

will not decree a specific performance of an
t made in a state of intoxication, although the
s not drawn in to drink by the plaintiff; nor will
the agreement to be delivered up; but will leave
es to their remedy at law (*o*).

stipulated in a contract, that immediate posses-
l be given to the purchaser, which is done, but in
nce of disputes as to the title, the seller afterwards
purchaser out of possession, he abandons his
a specific performance (*p*).

rt of equity frequently decrees a specific per-
where the action at law has been lost by the
f the very party seeking the specific performance,
twithstanding conscientious that that agreement
e performed, as in cases where the terms of the
nt have not been strictly performed on the part of
n seeking specific performance; and to sustain an
law, performance must be averred according to

ett v. Yielding, 2 Scho. 53. [misprinted in the Lord Redesdale; and
n v. Horner, 18 Ves.

Lord Eldon, see 7 Ves. nd see 3 Atk. 188; 4 .

Lord Hardwicke, see 1 Ves. 279; and see 3 Atk. 386; Ellard v. Lord Landaff, 1 Ball and Beatty, 241.

(*o*) Cragg v. Holme, 18 Ves. jun. 14, cited. See Say v. Barwick, 1 Ves. and Bea. 195.

(*p*) Knatchbull v. Grueber, 3 Mer. 124.

the

the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case (*q*).

Although damages may be recovered at law, yet equity is not, therefore, obliged to decree a specific performance; but the Court will judge on the whole circumstances of the case, whether it be such an agreement as ought to be carried into effect; for a jury, upon inquiry, may find very small damages, and then it would be very hard to carry such an agreement into execution in equity, when it would be greatly to the prejudice of the party against whom it should be decreed to be executed (*r*).

In a case where a man was entitled to a small estate under his father's will, given on condition that if he should sell it in twenty-five years, half the purchase money should go to his brother; he agreed, in writing, to sell it, and afterwards refused to carry the sale into execution, pretending to have been intoxicated at the time. A bill was brought against him to compel a specific performance; and Lord Hardwicke held, that without the other circumstance, the hardship alone of losing half the purchase money, if carried into execution, was sufficient to determine the discretion of the Court not to interfere, but leave them to law (*s*).

Nor will equity interpose, if the party who is called upon to do the act is not lawfully competent to do it; for that, amongst other inconveniences, would expose him to a new action for damages (*t*).

(*q*) Davis v. Hone, 2 Scho. and Lef. 347. 741. See Lennon v. Napper, *ibid.* 684.

(*r*) *Per* Lord Hardwicke, MS. See Pope v. Harris, Lofft, 791, cited.

(*s*) Fain v. Brown, 2 Ves. 307, cited; Costigan v. Hastler, 2 Scho. and Lef. 160. See 2 Ball and Beatty, 283; Howell v. George, 1 Madd. 1.

(*t*) Harnett v. Yielding, 2 Scho. and Lef. 554; Ellard v. Lord Llandaff, 1 Ball and Beatty, 241. See *post*, p. 193.

Part

hough a covenant ought not to be performed yet equity will execute it according to a consci- odification of it, to do justice as far as circum- ill permit (*u*).

ssio veri, as well as *suggestio falsi*, is a ground l an agreement, or at least not to carry it into (*w*), and even an industrious concealment, during of the necessary repair of a wall to protect the m a river, which was a considerable outgoing, deemed a sufficient ground to withhold the aid (*x*) from a vendor. So where there is a mistake he parties as to what was sold, the Court will not in favour of either party (*y*). Even mere surprise persons, at a sale by auction, has been deemed to prevent the Court from assisting a purchaser, the known agent of the seller bid for the estate of the purchaser, and other persons present think- s bidding as a puffer on the part of the vendor, rred from bidding (*z*). So, in a recent case, e purchaser, previously to the sale by auction, endor that he would have nothing to do with the t afterwards went to the sale, *where he was con- y the company as a puffer* (I), and bid 8,000*l.*

s v. Hone, 2 Scho. and

Buxton v. Cooper, 3 S. C. MS.; Howard v. 2 Atk. 371; Young v. Cha. 138; 1 Trea. Eq. 1 Ball and Beatty, 241; ont v. Tasburgh, 1 Jac. 112.

ey v. Stratton, 1 Bro.

1 Ves. jun. 211; 6 Ves. jun. 339; 13 Ves. jun. 427; Higginson v. Clowes, 15 Ves. jun. 516; Clowes v. Higginson, 1 Ves. and Bea. 524; Harnett v. Yielding, 2 Scho. and Lef. 554.

(*z*) Twining v. Morris, 2 Bro. C. C. 326. See 6 Ves. jun. 338; 10 Ves. jun. 305. 313. 398; and see Willan v. Willan, 16 Ves. jun. 72; Magrane v. Archbold, 1 Dowe, 107.

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is stated in the judgment, but *qu.* whether it appeared in

for

for the estate, which was knocked down to him at that sum from the misapprehension of the person appointed to bid for the vendor, who ought to have bid 9,000 *l.* and the mistake was instantly explained, a specific performance was refused (*a*).

If an agent, employed to sell an estate, sells it in a manner not authorized by the authority given to him, a specific performance will not be decreed against the principal, although the estate be sold for a greater price than he required for it (*b*). At least, it is clearly settled, that if an agent is empowered to sell an estate by public auction, a sale by private contract is not within his authority. For although the owner may have fixed the price, yet the estate might have sold for more at a public auction. But if an agent is directed to sell an estate by private contract, and he dispose of it by public auction for a larger sum than the principal required, it still seems open to contend that the purchaser may enforce a specific performance of the contract, unless some particular reason should occur to induce the Court to refuse its aid.

In Mortlock *v.* Buller (*c*), Lord Eldon said, he should hesitate long before he should state as a clear proposition, that where the title to a specific performance is founded in a gross breach of trust by an agent to his principal, a court of equity would assist the plaintiff in the purpose of availing himself of that breach of trust: and whether the principle would not authorize the Court to leave him to law, and not to let him come for a remedy beyond that. There were, his Lordship added, *dicta* enough well to authorize that.

(*a*) Mason *v.* Armitage, 13 Ves. jun. 25. See Hill *v.* Buckley, 17 Ves. jun. 394.

(*b*) Daniel *v.* Adams, Ambl. 495; *et vide a dictum* by Lord Eldon in Coles *v.* Trecothick, 1 Smith's Rep. 247.

(*c*) 10 Ves. jun. 292; and see the close of the judgment.

And

where trustees for sale of an estate enter into a
t, which would be deemed a breach of trust, equity
t only refuse to interfere in favour of the purchaser,
l even at the suit of the *cestuis que trust* restrain
stees from executing the contract, and the purchaser
left to his remedy at law (*d*).

person, entitled in default of execution of a power of
ntract to sell the estate, not as owner, but merely
gent of the trustees, and the contract could not,
he circumstances, have been carried into execution
t the trustees, it will not be enforced against the
although he himself become entitled to the estate
the decree (*e*), (I).

re a person takes upon himself to contract for the
an estate, and is not absolute owner of it, nor has
a power by the ordinary course of law or equity to
imself so; though the owner offer to make the seller
yet equity will not force the buyer to take it, for
eller ought to be a *bonâ fide* contractor (*f*): and it

ortlock v. Buller, 10 Ves. jun. 315; and 1 Jac. and Walk. 421; and *query*, whether there is *any* case, in which a man, knowing himself not to have any title, has been allowed to enforce the contract by procuring a title before the report.

. See Hill v. Buckley, 17 . 394; Bridger v. Rice, 1 . Walk. 74.

ortlock v. Buller, 10 Ves. .

Tenbring v. London, 2 Eq. : 680, pl. 9. See 10 Ves.

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om the papers in this cause, it seems that Mr. Buller treated r. Mortlock as the owner of the estate, and this appeared from ipt for the purchase money, where the estate was called, "the of John Buller, Esq." and Mr. Mortlock had not any knowledge r that the estate was in settlement. See Lawrenson v. Butler, 1 d Lef. 13.

this note was written, an action brought by Mr. Mortlock Mr. Buller, for breach of contract, came on for trial, when it was nised on terms very advantageous to the plaintiff. See 2 Ball and 60; and see 2 Dow. 518.

would

would lead to infinite mischief if one man were permitted to speculate upon the sale of another's estate. Besides, the remedy is not mutual, which perhaps is of itself a sufficient objection in a case of this nature. In Armiger *v.* Clarke (*g*), a tenant for life contracted to sell the inheritance; after his death, his son, who was entitled to the estate in remainder, and was not bound by his father's covenant, brought a bill for a specific performance against the purchaser, and it was dismissed chiefly upon this principle, that the remedy was not mutual. And in Noel *v.* Hay (*h*), it was said, that if *A* sells *B*'s estate, although *B* is willing to confirm the contract, *A* cannot enforce it: there is no mutuality. But in Williams *v.* Carter (*i*), the estate was sold, and it was afterwards discovered that it was bound by marriage articles, which it was decided in a suit instituted for the purpose, authorized the introduction of a power of sale in the trustees, and thereupon a bill was filed by them and the seller for a specific performance. The Vice-Chancellor overruled the objection, that there was no mutuality in the agreement, and decreed a specific performance.

And on the other hand, where a *bonâ fide* vendor has not a title to the estate, the Court will not, in favour of the purchaser, decree an impossibility, but will leave the purchaser to his remedy at law upon the articles (*j*); and although he must necessarily obtain a verdict, if he have recourse to law, yet he would obtain nominal damages only (*k*), for a purchaser is not entitled to any compensation for the fancied goodness of his bargain, which he may suppose he has lost.

(*g*) Bunb. 111; see *post*, ch. 6; Hamilton *v.* Grant, 3 Dow. 33.

(*h*) V. C. 23 Feb. 1820. MS.

(*i*) MS. V. C. 1821.

(*j*) Crop *v.* Norton, 2 Atk. 74; 9 Mod. 233; Cornwall *v.* Williams, Colles, P. C. 390; Bennet College *v.* Carey, 3 Bro. C. C. 390.

(*k*) Fleaureau *v.* Thornhill, 2 Blackst. 1078; and see 3 Bos. and Pull. 107. See Brig's case, Palm. 364. *Vide post.*

But

But where the purchaser is willing to take the title, such as it is, it is apprehended that he may do so. In a late case (*l*), Lord Redesdale said, that the plaintiff in equity must show that in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do; for, if he does, a consequence is produced that quite passes by the object of the Court in exercising the jurisdiction, which is to do more complete justice. If a party is compelled to do an act which he is not lawfully authorized to do, he is exposed to a new action for damages, at the suit of the person injured by such act; and, therefore, if a bill is filed for a specific performance of an agreement made by a man who appears to have a bad title, he is not compellable to execute it, unless the party seeking performance is willing to accept such a title as he can give, and that only in case where an injury would be sustained by the party plaintiff, in case he were not to get such an execution of the agreement as the defendant can give. His Lordship took the reason to be this, among others, not only that it is laying the foundation of an action at law, in which damages may be recovered against the party, but also that it is by possibility injuring a third person, by creating a title with which he may have to contend.

It is, however, the received opinion, that the purchaser may elect to take the title, such as it is, although no injury would be sustained by him in case the agreement were not executed, nor does the rule seem to lead to the difficulty which has been apprehended; for, in such a case, the covenants must, of course, be so framed, as not to leave the seller exposed to an action on account of the flaw in the title; but where the conveyance would be merely void, and might embarrass persons claiming under the same title as

(*l*) Harnett *v.* Yielding, 2 Scho. and Lef. 549. See *post*.

the seller, equity seems to refuse its aid on substantial grounds (*m*).

But where a tenant for life with a power of sale, first settling other estates of equal or better value, sold the estate under an apprehension that he had power to convey the fee, the Court refused to compel him to settle another estate, in order to enable him to complete his contract (*n*).

To enable the Court to decree a specific performance against a vendor, it is not, however, necessary that he should have the legal estate; for if he has an equitable title, a performance in specie will be decreed (*o*), and he must obtain the concurrence of the persons seised of the legal estate.

Although, as we have seen, a vendor cannot demand the aid of equity, unless he is a *bonâ fide* contractor, yet the circumstance that the purchaser is a nominal contractor, and purchases in trust for another person, is immaterial; for it happens, in a vast proportion of cases, that the contract is entered into in the name of a trustee (*p*), and the mere fact of a quarrel having taken place between the vendor and the real purchaser, totally unconnected with the subject of the contract (*q*), or even a bare refusal by the vendor to deal with the real contractor (*r*), is not a sufficient ground to refuse a performance in specie of the agreement.

But if a person apply to purchase an estate, and the vendor expressly refuse to treat with him, unless the money is paid down, which he is unable to do, but pro-

(*m*) See Ellard *v.* Lord Llandaff, 1 Ball and Beatty, 244. See O'Rourke *v.* Percival, 2 Ball and Beatty, 56.

(*n*) Howell *v.* George, 1 Madd. 1.

(*o*) Crop *v.* Norton, 2 Atk. 74. See Costigan *v.* Hastler, 2 Scho. and Lef. 160.

(*p*) Hall *v.* Warren, 9 Ves. jun. 605.

(*q*) S. C.

(*r*) Lord Irnham *v.* Child, 1 Bro. C. C. 92.

cures

e other person to purchase the estate on his
seems clear, that at least the time appointed
nt of the money, will be deemed of the very
the contract (*s*). So if a person apply to pur-
state on behalf of *A*, for whom the vendor has
lue or affection, and the vendor is induced to
for the estate than he otherwise would have
even perhaps, without this circumstance, the
cannot be enforced against the vendor, if it be
behalf of any other person than *A*; but if *A*
ize the sale, execution of the agreement must
led, although he may sell the estate the next day
dulent purchaser (*t*).

se of Scott *v.* Langstaffe (*u*), was decided on
principle. A purchaser of a house adjoining
occupied by the vendor, agreed with the ven-
h it was not made part of the written contract,
uld not lease the house to any person not
to him. Langstaffe applied for a lease, and
he knew the vendor intimately, and that there
no objection to grant him a lease. The vendor,
disapproved of Langstaffe, and, so far from
him intimately, had only seen him at a tavern.
den said, this was the case of Philips *v.* the
Buckingham. Nobody, who had read that case,
ly forget it. And his Lordship set aside the
which Langstaffe had obtained, with costs.

n *v.* Eyre, Lofft, 786. 's note of this case danger of relying on of cases; see 1 Bro. 1. See O'Herlihy *v.* Schoales and Lefroy's nt note, that case was *dlord and tenant*; and tonhaugh *v.* Fenwick, 298.

(*t*) Philips *v.* Duke of Buckingham, 1 Vern. 227. In Mr. Raithby's edit. it is said that a specific performance was decreed. The principle however is now well established.

(*u*) Lofft, 797, 798, cited; and see Bonnett *v.* Sadler, 14 Ves. jun. 527.

A similar case is mentioned in Hawkins's life of Johnson, which was also decided on the authority of Philips's case. Peele the bookseller had a house near Garrick's at Hampton. Peele had often said, that as he knew it would be an accommodation to Garrick, he had given direction that at his decease he should have the refusal of it. On Peele's death, a man in the neighbourhood applied to his executors, pretending that he had a commission from a friend or relation of Peele's, who lived in the country, to buy the house at any price, and he accordingly obtained a conveyance of it to a person nominated by him under secret trust for himself. Garrick filed a bill against him, and the purchase was decreed fraudulent, and set aside with costs.

An agreement for the sale of an annuity for three lives, to be named by the purchaser, and to commence immediately, will be decreed, although the lives have not been named, if the delay has been occasioned by the seller (*v*).

In some cases (*w*), it has been holden, that where no action at law will lie to recover damages, equity will not execute the agreement in *specie*; for equity will never make that a good agreement, which is not so by law: but, in other cases (*x*), the contrary has been holden, and relief been given accordingly.

(*v*) Pritchard *v.* Ovey, 1 Jac. and Walk. 396.

(*w*) The Marquis of Normanby *v.* Duke of Devonshire, 2 Freem. 216; Dr. Betesworth *v.* Dean and Chapter of St. Paul's, Sel. Cha. Ca. 66; and see 2 Eq. Ca. Abr. 15. 23, *notis*; and Fonbl. n. (*c*) to 1 Trea. Eq. 138, and n. (*h*) to p. 204, *ibid.*

(*x*) Winged *v.* Lefebury, 2 Eq. Ca. Abr. 32, pl. 43; Acton *v.* Pierce, 2 Vern. 480; Cansel *v.* Buckle, 2 P. Wms. 243; Norton *v.* Mascall, 2 Vern. 24; and Hall *v.* Hardy, 3 P. Wms. 187. See East India Company *v.* Donald, 9 Ves. jun. 275; 1 Smith's Rep. 213.

Perhaps

Perhaps the following distinctions are authorized by the ases, and will reconcile them.

First, That although the agreement be void at law, yet specific performance will be decreed, if there is a clear round for the interference of equity, according to the eneral rules of the Court; and, however unqualifiedly ıe contrary rule may have been laid down, there is not hat I am aware of) any case clearly entitled to the aid f the Court, to which this rule has been successfully pposed as a bar to the relief.

Thus a bond from a woman to her intended husband has een enforced in equity, although void at law by the inter- arriage; and an agreement for sale of an estate has been ecreed against an heir at law, although his ancestor died efore the time appointed to convey the estate, and there- ore no action would lie against him. In the first of these ases, the impropriety of the security was deemed imma- erial; for it was sufficient that the bond was a written vidence of the agreement of the parties, and the agree- ent being upon a valuable consideration, ought to be xecuted in equity. The decision in the other case de- ended upon the doctrine, that the articles were a lien upon he land; the contract being a purchase in equity. But,

Secondly, Equity cannot contradict or overturn the grounds or principles of law (*y*); and therefore, in many ases, it must be considered whether damages could be recovered at law, and the Court will be guided by the result (*z*).

Thus agreements for sale of an estate have (as we have already seen) been decreed on mere letters which have passed between the parties, but not unless all the terms of the agreement were therein specified; and even this was going

(*y*) See 2 P. Wms. 753; Earl of Bath v. Sherwin, 10 Mod. 1.

(*z*) See Hollis v. Edwards, 1 Vern. 159.

a great way. In the first case, therefore, in which even a trifling omission appeared in the letters, it was natural to pause before the performance of the agreement was decreed, and to ascertain whether damages could be recovered at law: for the statute of frauds and perjuries must receive the same construction in a court of equity as in a court of law, unless in the case of fraud, &c. when equity interposes and relieves against the abuse, or allays the rigour of the law.

The case of the Marquis of Normanby *v.* the Duke of Devonshire, was, I believe, the first in which this point occurred; and, according to a manuscript note, it appears that Lord Somers called in the two chief justices on the point, whether the party, on the letters which had passed, could have recovered damages at law? They were of opinion that he could not, and Lord Somers accordingly dismissed the bill.

So there are very few cases in which a court of equity can decree a performance of an agreement upon which there can be no action at law, *according to the words of the articles, and the events that have happened* (*a*).

A proviso, in a contract for sale, that if either party break the agreement, he shall pay a sum of money to the other, will only be considered in the nature of a penalty (*b*); and consequently a specific performance will be decreed, just as if no such proviso had been inserted. The defendant will not be allowed to forfeit the penalty, and get rid of the agreement (*c*).

Where an action is brought for the recovery of the

(*a*) Whitmel *v.* Farrel, 1 Ves. 256.

(*b*) Howard *v.* Hopkins, 2 Atk. 371. See 2 Scho. and Lef. 684; and Magrave *v.* Archbold, 1 Dowe, 107.

(*c*) Hopson *v.* Trevor, 1 Str. 533; 2 P. Wms. 191; Parks *v.* Wilson, 10 Mod. 515.

penalty,

enalty, to entitle the party bringing it to recover, he ought unctually, exactly, and literally, to have completed his art (*d*). And, it has been said, that if, for breach of an greement, to which a penalty was annexed, either party re- ver damages at law beyond the penalty, equity will lieve against the verdict, on payment of the penalty nly (*e*); but this does not appear to be well founded, for, the party have two remedies at law, one for breach of ntract upon the covenant, or agreement, *toties quoties*; e other for the penalty at once (*f*), there appears to be o pretence for equity to relieve; although where large amages have been recovered at law, under a covenant hich it was unconscientious strictly to enforce, the party ay be relieved in equity, upon offering to perform the ovenant according to conscience: but even this seems, some measure, to be usurping the province of a jury, nd the equity is administered with great caution.

SECTION III.

Of the Remedies for a Breach of Contract.

If either the vendor or vendee refuse to perform the contract, the other may bring an action for breach of contract, or file a bill for a specific performance (*g*); although it appears to have been formerly thought that as a vendor only wants the purchase money, his remedy was at law (*h*).

(*d*) Duke of St. Albans *v.* Shore, 1 H. Blackst. 270.

(*e*) Shenton *v.* Jordan, Bunb. 132; but the reporter adds a *query*, for this seems an extraordinary opinion.

(*f*) See Harrison *v.* Wright, 13 East, 343.

(*g*) Lewis *v.* Lord Lechmere, 10 Mod. 503.

(*h*) See Armiger *v.* Clarke, Bunb. 111.

If a bill be filed for a specific performance, the Court will enjoin either party not to do any act to the injury of the other. Therefore, if the purchaser is in possession, and has not paid the money, the Court will grant an injunction against his cutting timber (*i*); so, on the other hand, the vendor will be restrained from conveying away the legal estate in the property; because such a measure might put the purchaser to the expense of making another party to the suit (*j*); and, *à fortiori*, he will be restrained from selling the estate to a third person (*k*). But in Spiller v. Spiller (*l*), the Lord Chancellor expressly laid it down, that upon a bill filed for a specific performance, he wished it to be understood, that the Court would not take from a seller the disposition of his property. So injunctions may be granted against the agents of the parties. But an injunction will not be granted against a person who is not a party to the suit; and, in a late case, in which, upon a bill filed by a seller for a specific performance, and an injunction against the purchaser's proceeding at law to recover the deposit from the seller's attorney, to whom it was paid, the present Vice-Chancellor refused the motion, with costs, because the attorney was not a party to the suit (*m*).

In all cases where a bill in equity is filed for a specific performance, either party may in general, if he please, have a reference as to the title. The vendor is entitled to this privilege in order to enable him to make out a title before a Master. The purchaser is allowed this right, in order that he may have the title assured in a manner he otherwise could not. As to a purchaser, the Court never acts upon the fact, that a satisfactory abstract was delivered; unless

(*i*) Crockford *v.* Alexander, 15 Ves. jun. 138.

(*j*) Echliff *v.* Baldwin, 16 Ves. jun. 267.

(*k*) Curtis *v.* Marquis of Buckingham, 3 Ves. and Beam. 168.

(*l*) 30 June 1819. MS.

(*m*) Brown *v.* Frost, E. T. 1818. MS.

the

y has clearly bound himself to accept the title upon
ract; but though the abstract is in the hands of the
ho says he cannot object to it, yet he may insist
reference; because, by the production of papers,
an be enforced, and by the examinations and in-
which can be made, by virtue of the decree, the title
examined in a manner it never could upon a mere
(n). Either party may, however, wave this right.
re a man makes a purchase of an estate, to which
lor represents that he has a good title, in such a case
chaser has a right to insist, that the question
he have or have not a good title shall be sifted to
om before he can be called upon to adopt either
ive, and before the vendor can be let off from his
contract (o).

her the confirmation of a report in favour of a title,
fect appear, by which the title is affected, the title
referred back to the Master (p). In a case where
r of a leasehold estate produced the leasehold title,
he Master thought sufficient, and reported accord-
and the Court held, that the lessor's title ought to
en produced, and sent it back to the Master to re-
s report; the seller had liberty given to him to
the freehold title. And it was considered that the
er was at liberty to enter into objections to the
title, which were not taken upon the former dis-
before the Master (q). And, upon the objections
terwards taken, the bill was dismissed (r).

ceptions are taken to the report, that a good title

s Lord Eldon's judgment
ns v. Hiles, 6 Ves. jun.
Mer. 137, *per* Lord El-

(p) Jeudwine v. Alcock, 1 Mad. 597.

(q) Fildes v. Hooker, 2 Mer. 424.

(r) S. C. V. C. 3d April 1818, MS.; 3 Madd. 193.

can

can be made, and are overruled, other objections to the title cannot be made; but if exceptions are allowed, and a new abstract of title is delivered, further objections may of course be brought in (*s*).

In Noel *v.* Hay (*t*), the seller rested his title on the construction of a will, by which he insisted the estate did not pass. The point was decided against him, and then he asked for a reference to the Master, to see whether he could make a good title, as he insisted that the devisees were trustees for him. This reference was objected to by the purchaser. The Court said, that it should have great difficulty in allowing the plaintiff after a decree to amend his bill, by bringing new parties before the Court. But time had been allowed to get an act of parliament. If the Master was of opinion that the devisees were trustees for the seller, he would report in favour of the title. If a suit should be necessary to try their equity, he would report against it.

A purchaser may file a bill for a specific performance, although it appears by the abstract, that the vendor has no title, and yet unless he chooses to take the title, the Court cannot force it upon him, on the ground of his having filed the bill with a knowledge of the objection (*u*).

Where objections are made by a purchaser, evidently with a view to gain time, the Court itself will enter into the consideration of the objections, without referring the title to a Master. So where a bill is filed by a purchaser, the vendor, the defendant, has been allowed, after answer, and before the hearing of the cause, to move, that an inquiry may be directed as to the title, and at what time the abstract was delivered, and whether it was sufficient. This was allowed, in order to enable the Court to dispose of the

(*s*) Brooke *v.* ——, 4 Madd. 212.
(*t*) V. C. 23 Feb. 1820, MS.
(*u*) Stapylton *v.* Scott, 16 Ves. jun. 272.

cause

rith dispatch (*v*). Again, where a vendor files a bill pecific performance, and the purchaser submitted to n the contract if a good title could be made, asserting pon the abstract a good title could not be made, it pon the motion of the plaintiff, referred to the Mas- inquire whether a good title could be made, and r it appeared upon the abstract, that a good title could le (*w*). Lord Eldon has observed, that some degree tation was excited in the Court, by persons called bbers, contracting for estates without any intention ing for them, and setting up defects of title, merely e view of gaining time to dispose of them; and, on ound, Lord Rosslyn was prevailed upon to direct a ce of the title immediately, on motion; and there much mischief in that upon a simple case of specific mance, where there is nothing more; but the relief e so modified and qualified, with reference to the and object of the contract, that unless it is purely int, great difficulty may arise (*x*).

later case, Lord Eldon directed a reference of the pon the bill of a vendor, *before the answer* was put in. ill was a mere averment of the contract, putting no l fact in issue, and the Court considered the plaintiff ertaking to do all such acts, for the purpose of exe- what the Court thinks right, as if the answer was in, he cause brought to a hearing. With that under- , if they cannot state any objection to the perform- and the reference is merely to look into the title, his hip did not apprehend the answer to be necessary that reference (*y*). But if the defendant's counsel

loss *v.* Mathews, 3 Ves. 9.

Wright *v.* Bond, 11 Ves. jun.

(*x*) 17 Ves. jun. 278.

(*y*) Balmanno *v.* Lumley, 1 Ves. and Beam. 224.

state

state that there are other objections, the title cannot be referred (*z*).

But in every case where the answer, upon reasons solid or frivolous, insists, that the agreement ought not to be executed, the Court must first dispose of the question raised (*a*). Therefore, where the question simply was, whether the vendor of a leasehold estate was bound to produce the lessor's title, a motion by the purchaser for a reference to the Master upon the title was refused (*b*). So where the defendant, the purchaser, alleges laches on the part of the plaintiff, as a ground for his not being compelled to perform the agreement, the Court will decide the question raised, before the title is referred to the Master (*c*).

Until lately, it was not the general practice, to make an inquiry, *ab ante*, at what time the plaintiff could make a title (*d*). If, upon the usual reference to the Master, to inquire whether the seller could make a good title, he reported in the affirmative, it might with a view to costs, have been referred back to the Master, to inquire whether a good title could have been made at the filing of the bill; and if not, when it was that a good title could be made (*e*); and this reference might be made as well after a decree, as after an interlocutory order. The Vice-Chancellor considered, that great additional expense and delay were occasioned by parties not asking in the first instance

(*z*) Matthews *v.* Dana, 3 Madd. 470.

(*a*) Blyth *v.* Elmherst, 1 Ves. and Beam. 1; see Paton *v.* Rogers, *ibid.* 351; Biscoe *v.* Bret, 2 Ves. and Beam. 377; Fullagar *v.* Clark, 18 Ves. jun. 481; Morgan *v.* Shaw, 2 Mer. 138; Boehm *v.* Wood, 1 Jac. and Walk. 419.

(*b*) Gompertz *v.* ——, 12 Ves. jun. 17. See Eldridge *v.* Porter, 14 Ves. jun. 139; and see 17 Ves. jun. 278.

(*c*) See Blyth *v.* Elmherst, *ubi sup.* Skelton's case, 1 Ves. and Bea. 517; Wallinger *v.* Hilbert, 1 Mer. 104; Lowe *v.* Manners, 1 Mer. 19.

(*d*) Gibson *v.* Clarke, 2 Ves. and Bea. 103. See Jennings *v.* Hopton, 1 Madd. 211.

(*e*) Daly *v.* Osborne, 1 Mer. 382; Birch *v.* Haynes, 2 Mer. 444.

where

where the circumstances of the case made it material, that if the Master should find that a good title could be made, then that he might inquire when such good title was first shown to the purchaser (*f*). In a later case of Harrington *v.* Secretan, where the purchaser moved for a second order, the learned judge, under the circumstances, granted the motion; but made a general rule, which he has since regularly followed, that the first reference should be to see whether a good title can be made, and if so, *at the request of either party*, to inquire when the seller showed a title. This rule appears to be entirely free from objection.

When the title is referred to the Master upon motion, and the report is against the title, the defendant may move to dismiss the bill with costs, and the Court can make the order without setting down the cause (*g*).

Where the purchaser has been a long time in possession of the estate, and of the abstract, without objecting to the title, a specific performance will be decreed at once without a reference as to the title (*h*).

A new practice has sprung up, by which certainly some suits have been quickly disposed of, but which has been a great surprise upon many parties. I allude to the practice of ordering a purchaser *in possession of the estate* upon motion to pay the purchase money into Court. This, under special circumstances, has even been done before answer (*i*); but the purchaser has, in some cases, had the option to pay the money, or give up possession (*j*); in others, an occupation rent has been set, deducting interest on

(*f*) Hyde *v.* Wroughton, 3 Madd. 279. See Anon. 3 Madd. 495.

(*g*) Walters *v.* Pyman, 19 Ves. 351; Whitcomb *v.* Foley, V. C. 1821, MS.

(*h*) Fleetwood *v.* Green, 15 Ves. jun. 594; Margravine of Anspach *v.* Noel, 1 Madd. 310.

(*i*) Dixon *v.* Astley, 1 Mer. 133. See Burroughs *v.* Oakley, 1 Mer. 52. 376.

(*j*) Clarke *v.* Wilson, 15 Ves. 317; Smith *v.* Lloyd, 1 Madd. 83; Morgan *v.* Shaw, 2 Mer. 138; Wickham *v.* Everest, 4 Madd. 53.

the

the deposit (*k*); and, in others, a receiver has been appointed (*l*).

This rule has been adopted where the possession has been given under a mutual apprehension that the title could be immediately made good (*m*)— where the purchaser had a sort of mixed possession with the vendor, and had paid part of the purchase money, was insolvent, and had attempted without effect to sell the estate (*n*)—where the purchaser approved of the title and prepared a conveyance, and then raised objections (*o*)—where the purchaser had been guilty of laches, and cut underwood (*p*). Even in a case where it appeared on the face of the abstract, that the title was bad, but the purchaser had sold and conveyed the estate to another purchaser (*q*). So where from circumstances an acceptance of the title was inferred (*r*)—again, where a time was fixed for payment of the purchase money by instalments, and the property was a *coal mine* (*s*).—In all these cases the rule has been applied, and if the estate be sold under a *decree*, the purchaser, if he enters into possession, will be compelled to pay his purchase money into Court, unless he entered with the express consent of the *Court* (*t*).

(*k*) Smith v. Jackson, 1 Madd. 618; Smith v. Lloyd, 1 Madd. 83.

(*l*) Hall v. Jenkinson, 2 Ves. and Beam. 125. See Clarke v. Elliott, 1 Madd. 606.

(*m*) Gibson v. Clarke, 1 Ves. and Beam. 500. See 1 Madd. 607.

(*n*) Hall v. Jenkinson, 2 Ves. and Beam. 125.

(*o*) Watson v. Upton, Coop. 92, n. But see Bonner v. Johnston, 1 Mer. 366; and see Crutchley v. Jerningham, 2 Mer. 502; Fournier v. Edwards, T. T. 1819, V. C. The deeds were executed, and an application was made for the completion of the purchase, but the purchaser had not the money. The motion was made upon the answer, by which the defendant claimed compensation for some charges.

(*p*) Burroughs v. Oakley, 1 Mer. 52, 376; Dixon v. Astley, 1 Mer. 133, 378, n.; Bradshaw v. Bradshaw, 2 Mer. 492.

(*q*) Brown v. Kelty, L. I. Hall, July 1816, MS.

(*r*) Boothby v. Walker, 1 Madd. 197; and see Smith v. Lloyd, 1 Madd. 83.

(*s*) Buck v. Lodge, 18 Ves. 450.

(*t*) Anon. L. I. Hall, 16 July 1816, MS.

But

But where the sale is not by the Court, and the seller
s thought proper to put the purchaser into possession
th an understanding between them, that he shall not pay
s money until he has a title, the purchaser cannot be
lled upon to pay the money into Court in this summary
ay (*u*), nor can the payment be compelled where the
ndor gives possession without stipulation (*v*), or the pur-
aser was in possession under another title, before the
ntract (*w*); or the possession was given independently
the contract, and the seller has been guilty of laches (*x*),
hough in such cases the purchaser may make himself
ble to the demand, by dealing improperly with the
tate, *e.g.* cutting trees, or selling it to another person (*y*).
Perhaps two simple rules may be deduced from the
ses: 1st. Where the possession is not taken under the
ntract, or is consistent with it, and the purchaser has not
alt improperly with the estate, the cause must take its
gular course.

But 2d, If the possession by the purchaser, without pay-
ent of the money, is contrary to the intention of the
rties, or is held according to it, but the purchaser has
ercised improper acts of ownership, for example, cutting
mber, by which the property is lessened in value, or
elling the estate, by which the first seller's remedy is
omplicated without his assent; in such cases, the Court
ill interpose and compel the purchaser to pay the pur-
hase money into Court.

Where the sum is large, the Court has allowed a long

(*u*) Gibson *v.* Clarke, 1 Ves. and Beam. 500.

(*v*) Clarke *v.* Elliott, 1 Mad. 606.

(*w*) Freebody *v.* Perry, Coop. 91; Bonner *v.* Johnston, 1 Mer. 366.

(*x*) Fox *v.* Birch, 1 Mer. 105.

(*y*) Cutler *v.* Simons, 2 Mer. 103; Bramby *v.* Teal, 3 Madd. 219; Gill *v.* Watson, *ibid.* 225.

day,

day, for instance, three months for payment of the money (*z*); and under proper circumstances, the time will be enlarged (*a*).

Although the defendant, by his answer, put in issue an objection to the title, and both parties examine witnesses to the point before the hearing, yet, upon a reference to the Master, both sides may produce further evidence before him (*b*).

If the seller has vested in him legally, or equitably, all the interest in the estate, it cannot be objected to the Master's report in favour of the title, that the legal estate is outstanding, although in a lunatic, against whom no commission has issued. The vendor has the power, provided he will take the means necessary for the purpose, of making a good title. If he neglect this, the question will properly arise when the Master comes to settle the conveyance (*c*).

Where an estate is sold in lots to different persons, the vendor cannot include them in one bill, for each party's case is distinct, and must depend upon its own peculiar circumstances, and there must be a distinct bill upon each contract (*d*). In demurring to a bill against distinct purchasers, as multifarious, the defendants need not deny combination (*e*), although that was formerly deemed essential (*f*).

(*z*) Townshend *v.* Townshend, L. I. Hall, March 3, 1817, Master of the Rolls for the Ld. Chan. MS.

(*a*) Brown *v.* Kelty, Michaelmas Term, 1816, MS., the Vice-Chancellor for the Lord Chancellor; Townshend *v.* Townshend.

(*b*) Vancouver *v.* Bliss, 11 Ves. jun. 458.

(*c*) Berkeley *v.* Daub, 16 Ves. jun. 380.

(*d*) Rayner *v.* Julian, 2 Dick. 677; Brookes *v.* Lord Whitworth, 1 Madd. 86.

(*e*) Brookes *v.* Whitworth, 1 Mad. 86.

(*f*) Bull *v.* Allen, Bunb. 69.

If

urchaser's defence to a bill for a specific perform- merely on the want of title in the vendor, he lepend on his answer, and not to file a cross-bill e agreement delivered up; because the vendor no use of the contract if he have no title (*g*). rchaser should not make the stewards or receivers dor parties to his bill for a specific performance; gh, as we have already seen, the vendor is trustee for the purchaser, yet this rule does not the agents of the vendor (*h*).

the plaintiff, in a bill for a specific performance, ove his agreement, as laid; but the defendant, es the agreement to be different, offers to perform ly the agreement which he represents, the Court te the agreement as proved by the answer, with- s-bill, although the plaintiff should wish to have dismissed (*i*), if the Court think the defendant o a specific performance (*j*).

a plaintiff insist upon a particular construction act, and the Court decides against him, he will lowed a specific performance according to the ion against which he has contended. It is not se of a plaintiff calling upon the Court to con- l execute an agreement, according to the true ion; suggesting that which he conceives to be

rchaser have recourse to equity, and it appear vendor has, since the filing of the bill, sold the another person, the Court will, it has been deter-

n v. Barrow, 1 Ves. jun.

amara v. Williams, 6 18.

r. Clayton, 13 Ves. jun.

(*j*) Higginson v. Clowes, 15 Ves. jun. 516.

(*k*) Clowes v. Higginson, 1 Ves. and Beam. 524.

 mined,

mined, refer it to a Master, to inquire what damage the purchaser has sustained; and the sum which shall be found due, together with costs, will be directed to be paid to him (*l*). Equity, however, cannot give the purchaser an compensation, where he files a bill to have the contract delivered up on account of the defective title of the vendor. But he will obtain a decree for delivering up of the contract, without prejudice to his remedy at law for breach of it (*m*).

In a recent case, upon a specific performance, where Lord Eldon refused to direct an issue or an inquiry before the Master, with a view to damages, his Lordship said, that the plaintiff must take that remedy, if he chooses it, at law. In Denton *v.* Stewart, the defendant had it in his power to perform the agreement, and put it out of his power pending the suit. The case, if it was not to be supported upon that distinction, was not according to the principles of the Court (*n*).

In a late case (*o*), where a seller had, after a contract for sale, sold at an advance to another person, the bill filed by the first purchaser, prayed, that if the second purchaser bought without notice, the seller might account to the plaintiff for the advanced price. It was not necessary to decide the point; but Lord Eldon observed, that the estate by the first contract, becoming the property of the vendee, the effect was that the vendor was seised as a trustee for him; and the question then would be, whether the vendor should be permitted to sell for his own advantage the estate of which he was so seised in trust, or

(*l*) Denton *v.* Stewart, 1 Cox, 258; 1 Ves. jun. 329; 17 Ves. jun. 276, cited; Reg. Lib. A. 1785, fol. 552, 717; *supra*, p. 102, n.; Greenway *v.* Adams, 12 Ves. jun. 395.

(*m*) Gwillim *v.* Stone, 14 Ves. jun. 128.

(*n*) Todd *v.* Gee, 17 Ves. jun. 273; Blore *v.* Sutton, 3 Mer. 237.

(*o*) Daniels *v.* Davison, 16 Ves. jun. 249.

should

ould not be considered as selling it for the benefit of at person for whom, by the first agreement, he became ustee, and therefore liable to account. The ultimate cision was, that the first purchaser was entitled to a spe-fic performance against the seller and the second pur-aser, the latter being considered to take subject to the uity of the first purchaser, to have a conveyance of the tate at the price which he agreed to pay for it (*p*).

It may here be observed, that if an exception taken to a port, that a good title cannot be made, be overruled, e vendor should obtain an order for the exception to and over; as, if disallowed, it would appear upon record at a good title could not be made (*q*).

If the abstract be not delivered in time or objections rise to the title, the vendee may bring an action at law r non-performance of the agreement, in which case the endor's remedy (if he can insist on the contract being ecifically performed) is to file a bill for a specific per-rmance, and an injunction to restrain the proceedings at w; and the vendor may file his bill for a performance *specie*, although the vendee may have recovered his eposit at law. If an injunction be granted, the Court ill not dissolve it, without the Master's report as to the itle, where the action is brought on the ground of want f title (*r*).

If a purchaser, upon a bill being filed for a specific per-rmance, pay the purchase money without putting in an nswer, and afterwards discover that a fraud was com-itted in the sale, he is not precluded from bringing an ction for damages, if he come recently after discovery of he deception (*s*).

Where the purchaser has paid any part of the purchase

(*p*) 17 Ves. jun. 433.
(*q*) See 1 Ves. jun. 567.
(*r*) Church v. Legeyt, 1 Pr. 301.
(*s*) Jendwine v. Slade, 2 Esp. Ca. 257.

money, and the seller does not complete his engagement, so that the contract is totally unexecuted, he, the purchaser, may affirm the agreement, by bringing an action for the non-performance of it, or he may elect to disaffirm the agreement *ab initio*, and may bring an action for money had and received to his use (*t*).

In this latter action, however, the plaintiff cannot recover more than the money paid, although the estate has risen in value; while, on the other hand, it may perhaps be thought, that if the estate has experienced a diminution in value, he can only recover the damages he sustained by the estate not being conveyed, that being the only money retained by the defendant against conscience; and therefore the plaintiff, *ex æquo et bono*, ought not to recover any more (*u*).

The right to disaffirm the agreement is, in some cases, of great importance. Thus, if an agent enter into an agreement on behalf of his principal, but on the face of the agreement the agent appears to be the real purchaser, and is so considered by the vendor, the principal cannot, at law, it seems, enforce the observance of the agreement, nor will he be liable for non-performance of it. But if the purchaser actually pay the deposit, although through the medium of his agent, and the vendor does not complete his engagement, so that the contract is rescindable, he himself may maintain an action for recovery of the deposit, which will be considered as money received by the vendor to the use of the real purchaser (*x*).

Where a purchaser rests his action on a defect in the title,

(*t*) See 2 Burr. 1011; Farrer v. Nightingale, 2 Esp. Ca. 639; Hunt v. Silk, 5 East, 449; Squire v. Tod, 1 Camp. N. P. 293. See Levy v. Haw, 1 Taunt. 65.

(*u*) See Moses v. M'Farlau, 2 Burr. 1005; Dutch v. Warren, *ib.* 1010, cited, and Str. 406; S. C. Dale v. Sollet, 4 Burr. 2138, *sed qu.*

(*x*) Duke of Norfolk v. Worthy, 1 Camp. Ca. 337. See Edden v. Read, 3 Campb. Ca. 338.

, it is not sufficient to show that the title has been med insufficent by conveyancers, but he must prove the bad (*y*).

f he succeed in proving the title bad, he will, according he counts upon which he recovers, obtain a verdict ier for his deposit, or for damages, which in most cases uld be regulated by the amount of the deposit.

f he declare on the common money counts, he of course not obtain any damages for the loss of his bargain; even if he affirm the agreement by bringing an action non-performance of it, he will obtain nominal damages for the loss of his bargain (*z*), because a purchaser is entitled to any compensation for the fancied goodness is bargain which he may suppose he has lost, where vendor is, without fraud, incapable of making a title.

And in a late case (*a*), where an auctioneer who had adced some money on an estate, sold it by auction after authority from his principal had expired, and the prinf refused to confirm the sale, the Court of Common as, in an action brought by the purchaser, in which he ared on the agreement, and for money had and reed, &c. would not allow him damages for the loss of bargain, although it was proved that the estate was rth nearly twice the sum which he gave for it.

Nor in a case of this nature is a purchaser entitled to any mpensation, although he may be a loser by having sold of the funds, which may have risen in the mean time, ause he had a chance of gaining as well as losing by a ctuation of the price (*b*).

(*y*) Camfield *v.* Gilbert, 4 Esp. 221.

(*z*) Flureau *v.* Thornhill, 2 Blackst. 1078; and see 3 Bos. and Pul. 167. See Brig's case, Palm. 4.

(*a*) Bratt *v.* Ellis, MS. Appendix, No. 7; and see Jones *v.* Dyke, MS. Appendix, No. 8.

(*b*) Flureau *v.* Thornhill, 2 Blackst. 1078.

But a purchaser is entitled to interest on his deposit (*c*); and if the residue of the purchase money has been lying ready without interest being made by it, he is entitled to interest on that (*d*). Where the plaintiff recovers under a special count on the original contract, which, we have seen, affirms the agreement, interest will be given as part of the damages for non-performance of the agreement: where he recovers under a count for money had and received, which disaffirms the contract, and to which is mostly added a count for interest, it may, it should seem, be recovered as damages sustained by the plaintiff, by reason of the money having been withheld from him. If, however, the original contract is void, as if it be a parol agreement for the sale of lands, the purchaser, it seems, can only recover his deposit in an action for money had and received, and will not be allowed interest (*e*).

Where the plaintiff declares on the original contract, and lays the expenses incurred in investigating the title, &c. as special damages, he will be entitled to recover them as such (*f*). In one case Lord Ellenborough threw out a doubt upon this (*g*); but in a subsequent case before his Lordship, in which Gibbs, C. J. then at the bar, was counsel for the vendor; the defendant, a purchaser, obtained a verdict for his deposit with interest, and the *expenses of investigating the title*, without argument, it being admitted, that the title was defective (*h*): in a still later

(*c*) See ch. 10, *infra*.

(*d*) Flureau *v.* Thornhill, *ubi sup.*

(*e*) Walker *v.* Constable, 1 Bos. and Pull. 306. In this case, however, the rule was laid down generally, that interest could not be recovered in an action for money had and received; and see Tappenden *v.* Randall, 2 Bos. and Pull. 472, *sed qu.*; and see ch. 10, *infra*.

(*f*) Flureau *v.* Thornhill, *ubi sup.*; Richards *v.* Barton, 1 Esp. Ca. 268; Bratt *v.* Ellis, Jones *v.* Dyke, App. Nos. 7 and 8.

(*g*) Camfield *v.* Gilbert, 4 Esp. Ca. 221.

(*h*) Turner *v.* Beaurain, Sitt. Guildh. cor. Lord Ellenborough, C. J. 2d June 1806, MS.

case,

case, they were also recovered by a purchaser (*i*); and there are other cases not reported in which I am told such expenses have been recovered. If the rule were otherwise, it would induce many persons upon speculation to offer an estate for sale, knowing the title to be bad; and yet, in a late case at *nisi prius*, Mansfield, C. J. held, that the purchaser was not entitled to recover back the expenses of investigating the title (*k*).

But clearly the expenses cannot be recovered under a count for money had and received; and Lord Ellenborough has decided that they cannot be recovered under a count for money paid, &c. to the defendant's use, as the money is expended for the purchaser's own satisfaction as to the title which he is about to take (*l*).

Where a vendee brings an action on account of the agreement not having been completed, he will be compelled to give the vendor a particular of every matter of fact which he means to rely upon at the trial, as having been a cause of his not being able to complete the purchase; but he is not bound to state in his particular any of the objections in point of law arising upon the abstract (*m*).

But where no particular has been obtained, the plaintiff is not confined to the objections which he may have stated to the defendant, but may take advantage of any other, which may entitle him to recover as for breach of the agreement (*n*).

To entitle a vendor to sustain an action for breach of

(*i*) Kirtland *v.* Pounsett, 2 Taunt. 145; see p. 146.

(*k*) Wilde *v.* Fort, 4 Taunt. 334. Note, the C. J. also ruled, that interest on the deposit is not recoverable, which is contrary to other authorities; and too large a construction, according to other authorities, appears to have been put on the statute of Elizabeth.

(*l*) Camfield *v.* Gilbert, 4 Esp. Ca. 221.

(*m*) Collet *v.* Thomson, 3 Bos. and Pull. 246.

(*n*) Squire *v.* Tod, 1 Camp. Cas. 293.

 contract,

contract, it has been said, that he must show what title he has; it not being sufficient to plead that he has been always ready and willing, and frequently offered to make a title to the estate (*o*). In a late case (*p*), however, where a vendor averred, *that he was seised in fee*, and made a good and *satisfactory* title to the purchaser of the estate, by the time specified in the conditions of sale, it was held sufficient, and that it was not necessary for him to show how he deduced his title to the fee. And the Court seemed of opinion, in opposition to the prior cases, that a vendor need not display his whole title on the record. This decision, without working an injustice, will in most cases render it unnecessary to load the pleadings with the title of the vendor.

But even if the title is set out, yet the execution of the title-deeds need not be proved, because that is never required of a vendor (*q*). This was decided by Lord Kenyon at *nisi prius*. To prove the plaintiff's title to a right of way sold, the deeds were produced; and it was objected, that the deeds themselves should first be made evidence, by producing the subscribing witnesses. But Lord Kenyon ruled it not to be necessary. He said, he would never allow where the question was respecting a title, that the party should be called upon to prove the execution of all the deeds deducing a long title; that it was never mentioned in the abstract, or expected in making out a title in any case of a purchase, more particularly where possession has accompanied them: he therefore admitted them without proof of the execution (*r*). In a late case, however,

(*o*) Philips v. Fielding, 2 H. Blackst. 123; and see Duke of St. Albans v. Shore, 1 H. Black. 270; Luxton v. Robinson, Dougl. 620.

(*p*) Martin v. Smith, 6 East, 555; 2 Smith, 543; and see Co. Litt. 303, b.

(*q*) Thomson v. Miles, 1 Esp. Ca. 184.

(*r*) Thomson v. Miles, *ubi sup.*

Before

before Lord C. J. Mansfield, at *nisi prius*, where in assumpsit upon an agreement to purchase a leasehold house, it appeared, that the plaintiff, the vendor, was the third or fourth assignee of the term; and it was contended, that he need only prove the execution of the last assignment: it was ruled otherwise; and he was compelled to prove the lease and all the mesne assignments (*s*). Lord Kenyon's decision was not however adverted to; and as that clearly coincides with the practice in these cases, it can scarcely be considered as overruled (I).

If the agreement is in the hands of one of the parties, or his attorney, equity, in case a bill is filed, will compel it to be delivered up to the other party, in order that it may be stamped (*t*). So, in case of an action, if only one part of the agreement has been executed, the party, in whose possession it is, shall be compelled to produce it to the other party (*u*). And if there are even two parts, but one only is stamped, the party having the unstamped part may give secondary evidence of the contents of the agreement, if the other, after notice, refuse to produce the stamped part (*x*).

Where a contract is not completed merely on account of objections to the title, and the vendor thinks his title good, he seldom has recourse to equity, but brings an action at law for non-performance of the agreement.

(*s*) Crosby *v.* Percy, 1 Camp. Ca. 303.

(*t*) *Supra*, p. 75.

(*u*) Blakey *v.* Porter, 1 Taunt. 386; Bateman *v.* Philips, 4 Taunt. 157; King *v.* King, *ib.* 666; Street *v.* Brown, 1 Marsh. 610.

(*x*) Garnons *v.* Swift, 1 Taunt. 507. See Waller *v.* Horsfall, 1 Camp. Ca. 501.

(I) The vendor's counsel cited Nash *v.* Turner, 1 Esp. Ca. 217; but Mansfield, C. J. thought that it did not apply.

It

It becomes therefore material to consider, whether courts of law can take cognizance of equitable objections to a title; because, if they cannot, a purchaser should in such cases file a bill in equity: he might otherwise be compelled to pay damages for not accepting a title, which, although good at law, might be invalid in equity.

The action which a vendor must bring, being founded upon the equitable circumstances of the case between the parties, it seems that a court of law may in such action take cognizance of equitable objections to a title; and if there were any, ought not to permit the plaintiff to recover.

In a recent case (*y*), the Court of B. R. would not permit the assignees of a bankrupt to recover money from his trustees, because the deed by which the trusts were created, although perhaps void at law, would probably be restored and set up again by a court of equity. The Court, I am informed, said they would not permit the assignees to recover, as it would be to no purpose. It would be merely driving the trustees to the other side of the hall, where they would most likely regain the property. This case seems in point; the same observation would apply to a vendor endeavouring to obtain the purchase money where there were equitable objections to his title: the Court would naturally say, *cui bono*, when the purchaser can compel you to repay it in equity?

Lord Kenyon held, that a court of law could not enter into equitable objections to a title *where the purchaser is plaintiff* (*z*); but Lord Alvanley (*a*) decided, that if a purchaser would be liable in equity, he is entitled to recover his deposit at law. The last case is certainly a very strong authority, because no judge sitting in a court of law could

(*y*) Shaw *v.* Jakeman, 4 East, 201.

(*z*) Allpass *v.* Watkins, 8 Term Rep. 516.

(*a*) Elliott *v.* Edwards, 3 Bos. and Pull. 181.

be

averse than Lord Avanley was, to assume any jurisdiction (*b*). His decision has been followed nt case, which has set the point at rest (*c*). Lord bbs said, that the question was, whether the con- re merely for a good title, or for a legal and equita- . Now the words of the condition were, that a le should be made out at the vendor's expense. n the meaning of that be, except that there shall od title both at law and in equity? The vendor, , not having made out a good equitable title, the on the part of the defendant is broken. It is true re in a court of law, but we are on the question the contract have been complied with. Accord- ne defendant's doctrine, if an estate be devised to d [in trust *for*] *C*, it might be sold by *A* and *B* only, y could give a legal title to it without the concur- *C*. And, if this principle were to be followed up, ndant might bring an action for the remainder of hase money. The rest of the Court concurred s opinion, Mr. Justice Chambre observing, that s no reason why questions respecting equitable ld not come incidentally before a court of law.

e quitting this subject, it must be remarked, that in ts for purchase, the covenants are construed ac- to the intent of the parties; and they are therefore considered dependent, where a contrary intention t appear (*d*), (I). The true rule, Lord C. J. Mans- field,

Johnson *v.* Johnson, 3 all. 162.
erly *v.* Robins, 1 Marsh. unt. 625.

(*d*) As to where covenants are precedent, and where dependent, see Mr. Serjeant Williams's note (4) to 1 Saund. 320.

Morris *v.* Knight, T. 2 Jac. II. B. R. there were mutual cove- e agreed to pay a sum of money for a lease for years; the other covenanted

field, in a late case (*e*), said, was, that it is not the employment of any particular word which determines a condition to be precedent, but the manifest intention of the parties.

The old law was certainly in favour of the contrary doctine (*f*); but if, as Lord Kenyon observed, the Courts were to hold otherwise than they now do, the greatest injustice might be done; for supposing, in the instance of a trader who had entered into a contract for the sale of an estate, that between the making of the contract and the final execution of it he were to become a bankrupt, the vendee might be in the situation of having had payment enforced from him, and yet be disabled from procuring the property for which he had paid (*g*).

If, therefore, either a vendor or vendee wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent; for he cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal.

Thus a vendor cannot bring an action for the purchase money, without having executed the conveyance, or offered to do so, unless the purchaser has discharged him from so doing (*h*); but if the purchaser give a bill of exchange, or other security, for the purchase money, payable at a certain day, he must pay it when due, and cannot resist the pay-

(*e*) Smith *v.* Woodhouse, 2 New Rep. 233. See Havelock *v.* Geddes, 10 East, 555.

(*f*) 8 Term Rep. 370, 371.

(*g*) See Duke of St. Albans *v.* Shore, 1 H. Black. 270; Goodisson *v.* Nunn, 4 Term Rep. 761; Glazebrook *v.* Woodrow, 8 Term Rep. 366; and Heard *v.* Wadham, 1 East, 619; and see Amcourt *v.* Elever, 2 Kel. B. R. 159.

(*h*) Jones *v.* Barkley, Dougl. 684; Philips *v.* Fielding, 2 H. Black. 123; and see 3 East, 443.

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covenanted that he should enter in twenty days, and that he would make a demise thereof, from, &c. and the plaintiff brought an action for non-payment of the money before the demise made, held not good, for the lease is the consideration: so judgment for the defendant. MS.

ment

n in the case of a bill of exchange, on the ground e was no consideration for the drawing of the bill, the seller has refused to convey the estate accord- e agreement. But he will have his remedy upon ement for the non-execution of the conveyance (*i*). e other hand, a purchaser cannot maintain an ac- breach of contract, without having tendered a con- and the purchase money (*k*).

ast position has, however, been rendered doubt- ome recent *dicta* of the judges (*l*), that it is in- on the *vendor* to prepare and tender a convey- hich, as a general rule, certainly seems to have l when the simplicity of the common law reigned, ession was the best evidence of title; but upon tions of estates being introduced, which were un- o the common law, and which brought with them ifficulties which surround modern titles, it became y to make an abstract of the numerous instru- lating to the title, for the purpose of submitting purchaser's counsel; and it then became usual o prepare the conveyance. This practice has con- nd is now the settled rule of the profession: the ndeed, sometimes departed from, but this seldom except in the country, and then it always arises nsent, or express stipulation.

ate case (*m*), this point came distinctly before the Exchequer, and it was, in conformity to the pre-

Moggridge *v.* Jones, 14 ; 3 Camp. Ca. 38; and . Cox, 1 Marsh. 176. l Esp. Ca. 191; *ex parte* 1 Atk. 147. l. Rosslyn, in Pincke *v.* Bro. C. C. 332; Mac- B. in Growsock *v.* Smith, 3 Anstr. 877; Lord Kenyon, in Heard *v.* Wadham, 1 East, 627; and Lord Eldon, in Seton *v.* Slade, 7 Ves. jun. 278.

(*m*) Baxter *v.* Lewis, 1 Forrest's Rep. Exchcq. 61; and see Marin *v.* Smith, 2 Smith, 543; but see Standley *v.* Hennington, 6 Taunt. 561.

sent

sent practice of the profession, decided, that the purchaser, and not the vendor, is bound to prepare and tender the conveyance. And in Webb *v.* Bettel (*n*), the same rule was expressly recognized by Windham, J. and denied by no one. He said, "that where a person is to execute a conveyance generally, there the counsel of the purchaser is intended to draw it, and then the purchaser ought to tender it."

It is settled, that if a conveyance is to be prepared at the expense of purchaser, he is bound to tender it (*o*). Now it is admitted on all hands, that the expense of the conveyance must be borne by the purchaser, if there be no express stipulation to the contrary. Therefore, where there is no such stipulation, the purchaser is bound to tender the conveyance.

Upon the whole, notwithstanding the recent *dicta* to the contrary, as the precise point came before the Court of Exchequer, in Baxter *v.* Lewis, and their decision accords with the *uniform practice* of conveyancers, which has always met with the greatest attention in courts of justice (*p*), we may perhaps be warranted in saying, that the purchaser, and not the vendor, ought to prepare and tender the conveyance.

If the purchaser is required by the agreement to prepare the conveyance, it is clear that the vendor may maintain an action or file a bill, without tendering a conveyance (*q*); and therefore, to prevent all doubt on this point, it seems advisable to stipulate in the agreement or conditions of sale, that the conveyance shall be prepared by, and at the expense of, the purchaser. A purchaser must, however,

(*n*) 1 Lev. 44.

(*o*) Seward *v.* Willock, 5 East, 198.

(*p*) See 2 Atk. 208; 1 Term Rep. 772; Wilmot, 218.

(*q*) Hawkins *v.* Kemp, 3 East, 410.

prepare

prepare the conveyance, although it is merely declared that the conveyance shall be at his expense (*r*).

But although a purchaser is expressly required to prepare a conveyance, yet if a bad title be produced, he may maintain an action for recovery of his deposit, without tendering a conveyance (*s*). So where a vendor has, by selling the estate, incapacitated himself from executing a conveyance to the first purchaser, that renders further expense and trouble on his part unnecessary; and he may accordingly sustain an action without tendering a conveyance, or the purchase money (*t*).

Although a seller's bill for a specific performance be dismissed, yet he may in general, still bring his action at law for breach of the agreement; and there are instances of sellers recovering damages, in such cases, where the Court refuses its interference, and yet thinks, that the seller is entitled to enforce his contract at law; it is usual to add a declaration to the decree, dismissing the bill, that it is without prejudice to the plaintiff's remedy at law. Where such a declaration is not added, equity will restrain the seller from bringing an action in a proper case, for example, where the bill was dismissed because the seller had no title (*u*).

Where a purchaser is let into possession, on a treaty for purchase, he does not become tenant to the seller; and if the seller cannot make a title, it is doubtful whether an action will, under any circumstances, lie against the purchaser. It is settled that the action will not lie, where the

(*r*) Seward v. Willock, 5 East, 198.

(*s*) Seward v. Willock, *ubi sup.*; S. P. ruled by Lord Ellenborough, C. J. in Lowndes v. Bray, Sitt. after T. T. 1810.

(*t*) Knight v. Crockford, 1 Esp. Ca. 180. See Duke of St. Albans v. Shore, 1 H. Black. 270.

(*u*) M'Namara v. Arthur, 2 Ball and Beat. 349.

occupation

occupation has not been beneficial to him (*x*), beyond the mere protection from the inclemency of the whether, and if he paid the money, of which the seller might have made interest, although the jury expressly find, that the value of the house, during the occupation of the purchaser, exceeds the interest of the money paid, yet the seller cannot recover (*y*); for it is impossible to make the rules of law depend on the balance of loss or gain in each transaction: one party must take back his money, and the other take back his house. A contract cannot arise by implication of law, under circumstances, the occurrence of which neither of the parties ever had in their contemplation.

But as the possession is in these cases lawful, being with the assent of the seller, an ejectment will not lie against the purchaser without a demand of possession, and refusal to quit (*z*); unless upon possession being given to him, he agreed to quit possession, if he should not pay the purchase money on a given day, or the like; in which case, an ejectment will lie, without notice, on non-performance of his agreement. The agreement operates in the same manner as a clause of re-entry on breach of covenant in a lease (*a*).

A writ of *ne exeat regno* does not lie against a purchaser who has not paid the purchase money, upon his

(*x*) Hearne v. Tomlin, Peake's Ca. 192.

(*y*) Kirtland v. Pounsett, 2 Taunt. 145.

(*z*) Right v. Beard, 13 East, 210. See Hegan v. Johnson, 2 Taunt. 148; Doe v. Lawder, 1 Stark. 308.

(*a*) Doe v. Sayer, 3 Camp. Ca. 8. The same doctrine is extended to an *agreement* for a lease, Doe v. Smith, 6 East, 530; Doe v. Brewin, 6 Esp. Ca. 106. In the latter case, it seems to deserve reconsideration, upon substantial grounds, which will readily occur to the learned reader.

threatening

threatening to go abroad, unless the vendor's title has been accepted, and the purchaser has no property here (*b*).

If a man convey his estate to trustees to sell and pay debts, and afterwards file a bill to stop the sale, on the ground that the trustees, by giving shorter notice of the intended sale than was usual, and other circumstances, would materially injure the sale, the Court will not grant an injunction upon the filing of the bill, to restrain the sale, although it is sworn that the sale is to be made the next day. It is not one of those cases in which on account of irreparable injury to the plaintiff, the Court proceeds in this summary way. If the trustees shall be guilty of a breach of trust in making the proposed sale, they will be answerable to the plaintiff for the damage sustained (*c*).

Where a man sells an estate for an annuity, without any agreement being made respecting the security to be given for it, he is entitled to have it secured, not only upon the estate, but also by the bond of the purchaser, and a judgment to be entered up against him (*d*). In Ker *v.* Clo-ery (*e*), which came before the Court upon a petition between the heir and executor, it appeared that the equity of redemption was sold to the mortgagee for the mortgage money, and a life annuity to be paid to the sel- and his wife, and the survivor of them; but nothing s. said as to the mode in which the annuity was to be ured. It was held to be a purchase of the equity of mption, subject to the annuity, which ought to be ged on the estate. It was an interest reserved by the out of the estate.

ery, if this does not recon- rines—Goodwin *v.* Clarke, 407; and Anon. *ibid.* note? ton *v.* Petrie, 10 Ves. jun.

(*c*) Pechell *v.* Fowler, 2 Anstr. 550.

(*d*) Remington *v.* Deverall, 2 Anstr. 550.

(*e*) V. C. 27 Mar. 1819, MS.

A purchaser

A purchaser of an estate subject to incumbrances, must indemnify the vendor against them, although he did not expressly engage to do so.

Thus a purchaser of a leasehold estate must covenant with the vendor to indemnify him against the rents and covenants in the lease, although he is not required to do so by the agreement for sale (*f*).

So, although a purchaser of an equity of redemption enter into no obligation with the party from whom he purchases, to indemnify him from the mortgage money, yet equity, if he receives the possession, and has the profits, would, independently of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the mortgage money; for being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage (*g*).

And if a purchaser who has not obtained a conveyance sell to another, the second purchaser is, without entering into a covenant, bound to indemnify him against any costs incurred in proceedings for his benefit (*h*).

If a seller agree to give a real security as an indemnity to a purchaser upon his accepting the title, he will be compelled specifically to perform it, although he has not sufficient real estate, and offers a sufficient security upon personal estate (*i*).

It seems that where a mortgagor has agreed to convey his equity of redemption to the mortgagee, the proceedings in an ejectment by the mortgagee cannot be stopped under the 7 Geo. II. c. 20, for the effect of it would be to strip the mortgagee of his legal title, which might let in

(*f*) Pember *v.* Mathers, 1 Bro. C. C. 52, *et supra*, p. 32.

(*g*) See 7 Ves. jun. 337, *per* Lord Eldon.

(*h*) *Per* Lord Eldon, in Wood *v.* Griffith, 12 Feb. 1818, MS.

(*i*) Walker *v.* Barnes, 5 Madd. 247.

a posterior

rior equitable right to the prejudice of the mort- though he should thereafter obtain a decree for the nance of the agreement (*j*). But the relief will be l to the mortgagor, where the mortgagee has not ny steps to complete his contract for the purchase of uity of redemption (*k*).

urchaser of an estate let to a tenant from year to ay, without a new contract, or any act correspond- ttornment, recover the rent; and nothing would be defence in an action brought for it, but the fact that not know of the sale, and had paid his rent before lessor (*l*). So, if the estate is in lease, the purchaser led to the benefit of covenants entered into by the with the vendor (*m*), and may recover for a breach of enants before his time, if he is seised of the reversion the continuance of the term (*n*); and he may, otice to the tenant of the conveyance, distrain for arrear (*o*), whether the estate be freehold or old (I).

If

oodtitle v. Pope, 7 Term

inner v. Stacy, 1 Wils. 80. e 1 Vern. and Scriv. 289; Wright, 1 Term Rep. 378. nley v. Reisbeck, 15 East,

(*m*) See *post*, ch. 13, sect. 1, n. (1).

(*n*) Davis's case, M. T. 42 Geo. III. Woodfall's Land. and Tent. 529, 2d edit.

(*o*) See Moss v. Gallimore, Dougl. 279.

was recently proposed to deprive all middle men, even in l, of the right to distrain for rent in arrear. Thus, suppose a lease to be granted by John to James for ninety-nine years, a year; James builds a valuable house, and underlets to Joseph, years, at 100*l.* a year; and Joseph underlets to Jacob, for thirty 120*l.* a year; it is manifest that James has the greatest interest roperty; and, as the law now appears to stand, he can distrain for notwithstanding the last underlease. This right was proposed ten from him, but the measure was dropped.

If a person having a right to an estate, purchase it of another person, being ignorant of his own title; equity will

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In support of the measure, it was contended, that none but the original lessor is entitled to distrain for rent, according to the law of England; and therefore that, in the case which I have put, James would not be affected by the act; because he would not, as the law now stands, be entitled to distrain. The argument, which was managed with great ingenuity, was rested upon the statute of *quia emptores*, and some passages in Coke upon Littleton. When it is considered, that the right of distress, in the case above supposed, has never been disputed, it will not be matter of surprise, that the attempt to show that the practice is illegal did not succeed. That rent may be distrained for, although fealty is not incident to it, is laid down in Co. Litt. 142, b.; and it seems to be clear, that distress is incident to every rent at common law, where the lessor has a reversion; and that a reversion of a single day is, for this purpose, as operative as a reversion in fee. In the year book, 14 Edw. III, p. 8. Finchden thought, that if a lessee leased *all* his estate rendering rent, he could not distrain; he had no reversion. In the 2d Edw. IV. p. 11, the very objection was taken, where the lessor had a reversion; because it was only the reversion of a chattel; but it was held, that he had a right to distrain. In Brooke's Abridgment, Distress, case 45, and Rents, case 17, it is laid down, on the authority of this case, that if a man lease for twenty years, and the lessee leases over for ten years, rendering rent, there, if he grant the rent over to another man, he cannot distrain; because he has not the reversion of the term, which gives the right to distrain: contrary, if he had granted to him, the *reversion* and the rent. Note the diversity. In Wade v. Marsh, Latch, 211, it was held, that the lessor having only a reversion for years, may, by the common law, distrain for the rent, by reason of the reversion, which causes privity. These cases appear to be quite decisive. The only difficulty has been to find a case; for the point has not been doubted for centuries. It is to be hoped, therefore, that the right of mesne landlords to distrain for rent will not be violated, on the ground, that it depends upon a practice not sanctioned by law, and which ought to be abolished; but if it shall appear as it is alleged, that the remedy has been the source of great oppression against the tenantry of Ireland, the legislature will I confidently hope, extend its protection to so valuable a race of men, as far as may be consistent with a due regard to the rights of landlords: for, as Justice Twisden observed, we must not steal leather to make poor men's shoes.

compel

compel the vendor to refund the purchase money, with interest from the time of bringing the bill, although no fraud appear (*p*).

So where a person sold a remainder expectant upon an estate tail, and both parties considered that the remainder was unbarred, and it afterwards appeared that a recovery had been suffered before the contract, the purchaser was relieved against a bond which he had given for the purchase money, and the seller was compelled to repay the interest which he had received (*q*). This was a strong decision. The purchaser might have ascertained the fact by search. The Chief Baron laid down some very general propositions. His Lordship said, "that if a person sell an estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase money, that is certainly a fraud, although both parties should be ignorant of it at the time (*r*). Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact, am I to be allowed to receive 5,000*l.* and interest, because the conveyance is executed, and a bond given for that sum as the purchase money, when, in point of fact, I had not an inch of the land so sold to sell (*s*)." Both these cases, when they arise, will, it is apprehended, deserve great consideration before they are decided in the purchaser's favour. The decision must be the same, whether the money is actually paid or only secured (*t*).

If a lease be granted with power to the lessee to cut

Bingham *v.* Bingham, 1 Ves. See Lansdown *v.* Lansdown, 364; Saunders *v.* Lord Anglesea, 2 Scho. and Lef. 101; Leonard *v.* Leonard, 2 Ball and Beatty,

(*q*) Hitchcock *v.* Giddings, 4 Price, 135.

(*r*) But see 2 Cro. 196; 2 Ld. Raym. 1118; 1 T. Rep. 755; 2 Freem. 106; and *post*, ch. 9, s. 6.

(*s*) See ch. 5, s. 2, *post*.

(*t*) See *post*, ch. 9, s. 6.

and sell the timber, and the lessee is required *when and so often* as he intends to sell the timber, or any part thereof, to give notice to the lessor to whom the pre-emption was given; the lessee having a *bonâ fide* intention to cut down all the timber may give a general notice to the lessor, and if the lessor decline to purchase the timber, the lessee may cut it down at intervals, and need not repeat the notice (*u*).

A *bonâ fide* purchase of an interest will not be converted into a loan, on account of a power to repurchase being given to the seller, although at an advanced price; but, if the purchaser instead of taking the risk of the subject of the contract (*e. g.* an annuity) on himself, take a security for repayment of the principal, that will vitiate the transaction, and render it a mere mortgage security (*x*).

It may here be observed, that the grant of the office of a steward of a manor for life, is not revoked by a subsequent sale of the manor, but is binding on the purchaser; although, as lord, he will be entitled to the custody of the court rolls. In purchasing a manor, therefore, the instrument by which the steward was appointed should be called for. This is a precaution which has never been attended to.

(*u*) Goodtitle *v.* Saville, 15 East, 87. See Doe *v.* Abel, 2 Mau. and Selw. 541.

(*x*) Verner *v.* Winstanley, 2 Scho. and Lef. 393. See Senier *v.* Greenway, 19 Ves. jun. 413.

CHAPTER V.

OF THE CONSIDERATION.

SECTION I.

unreasonable and inadequate Considerations.

ems that a court of equity cannot refuse to assist a merely on account of the price being unreason- : and a specific performance will certainly be en- f the price was reasonable at the time the contract e, how disproportionable soever it may afterwards

wever, a man be induced to give an unreasonable an estate, by the fraud (*b*), or gross misrepresen- , of the vendor; or by an industrious concealment ct in the estate (*d*), equity will not compel him to the contract.

where these circumstances do not appear, but the a grossly inadequate consideration for the pur-

of London *v.* Richmond, 1; Hanger *v.* Eyles, 2 . 689; Hick *v.* Philips, 575; 21 Vin. Abr. (E), Keen *v.* Stukeley, Gilb. 55; 2 Bro. P. C. 396; Andrews, 9 Mod. 151; ord Lechmere, 10 Mod. le *v.* Saville, 1 P. Wms. s *v.* Weare, 1 Bro. C. C. 567; and the cases, as to inadequacy of price, cited *infra*.

(*b*) See James *v.* Morgan, 1 Lev. 111, a case at law. Conway *v.* Shrimpton, 5 Bro. P. C. last edit. 187.

(*c*) Buxton *v.* Cooper, 3 Atk. 383.

(*d*) Shirley *v.* Stratton, 1 Bro. C. C. 440.

chase money, equity will not relieve either party. Thus in a case at the Rolls before Lord Alvanley, by original and cross bill, the estate was represented on the one hand of the value of 9 or 10,000*l.*; and on the other of only 5,000*l.* The contract was for 6,000*l.*, and 14,000*l.* at the death of a person aged sixty-five. Lord Alvanley said, it was not a case of actual fraud; but it was insisted the bargain was grossly inadequate; and the inadequacy was very great: it was impossible upon the whole evidence to make the estate to be worth more than 10,000*l.*; though he ought not to decree a performance, yet as no advantage was taken of necessity, &c. he was not warranted to decree the vendor to deliver up the contract, the only inconvenience of which would be, that an action would lie for damages; and he accordingly dismissed both bills (*e*).

Indeed few contracts can be enforced in equity where the price is unreasonable, because contracts are not often strictly observed by either party; and if an unreasonable contract be not performed by the vendor, according to the letter in every respect, equity will not compel a performance *in specie* (*f*).

II. It appears to be settled, that mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance to a purchaser (*g*), particularly where the estate is sold by auction (*h*).

(*e*) Day v. Newman, 2 Cox, 77; 10 Ves. jun. 300, cited; and see Squire v. Baker, 5 Vin. Abr. 549, pl. 18.

(*f*) See the cases cited in n. (*a*), *ante*; and Edwards v. Heather, Sel. Cha. Ca. 3.

(*g*) Coles v. Trecothick, 9 Ves. jun. 234; Burrows v. Lock, 10 Ves. jun. 470. See Young v. Clark, Prec. Cha. 538; Barret v. Gumserra, Bunb. 94; Underwood v. Hithcox, 1 Ves. 279; Mortlock v. Buller, 10 Ves. jun. 292; and Lowther v. Lowther, 13 Ves. jun. 95; Western v. Russell, 3 Ves. and Bea. 187.

(*h*) White v. Damon, 7 Ves. jun. 30. See Collet v. Woollaston, 3 Bro. C. C. 228.

In

In White *v.* Damon, however, although the estate was sold by auction, Lord Rosslyn dismissed the bill merely on account of the inadequate price given for the estate, viz. 1,120*l.* and it was worth 2,000*l.*; but on a rehearing before Lord Eldon, although the decree was affirmed upon a different ground, yet his Lordship said, he was inclined to say that a sale by auction, no fraud, surprise, &c. cannot be set aside for mere inadequacy of value. It would be very difficult, he said, to sustain sales by auction, if the Court would not specifically perform the agreement. And in a subsequent case (*i*), his Lordship expressed the same opinion, and referred to the case of White *v.* Damon.

But if an uncertain consideration (as a life annuity) be given for an estate, and the contract be executory, equity it seems will enter into the adequacy of the consideration (*k*).

Although a purchaser is not bound to acquaint the vendor with any latent advantage in the estate (*l*), yet a concealment, for the purpose of obtaining an estate at a grossly inadequate price, may be deemed fraudulent.

Thus in the case of Deane *v.* Rastron (*m*), an agreement was made for sale of land at a halfpenny per square yard. The price was in all about 500*l.*, the real value 2,000*l.* The purchaser went out to an attorney, got him to calculate the amount, and desired him not to tell the vendor how little it was; then carried the agreement to the vendor, and prevailed on him to sign it immediately. The Court of Exchequer said, the desire of concealment would be such a fraud

(*i*) *Ex parte* Latham, 7 Ves. jun. 35, note.

(*k*) Pope *v.* Root, 7 Bro. P. C. 184; Mortimer *v.* Capper, 1 Bro. C. C. 156; and Jackson *v.* Lever, 3 Bro. C. C. 605.

(*l*) See 2 Bro. C. C. 420.

(*m*) 1 Anst. 64; and see Young *v.* Clerk, Prec. Cha. 538; Lukey *v.* O'Donnell, 2 Scho. and Lef. 466.

a fraud as to void the transaction, as parties to a contract are supposed, in equity, to treat for what they think a fair price.

So a misrepresentation by the purchaser, who was the agent of the seller, of the value of the estate, although it operated only to a small extent, has been held to be a sufficient defence against a bill for a specific performance; for to entitle a person to call for the aid of a court of equity, he must go there with clean hands (*n*).

Where neither of the parties knows the value of the estate, at the time the contract is entered into, no inadequacy of consideration will operate as a bar to the aid of equity in favour of the purchaser.

Thus, in a case (*o*) where a common was to be inclosed, one man having a right of common, agreed, before the commissioners had made any allotment, or any one could know what it was to be, to sell his allotment for 20 *l.* Afterwards it turned out to be worth 200 *l.* Sir Joseph Jekyll said, the contract ought to be enforced, as no one could know what the allotment would be; and both parties were equally in the dark; *but it might be different if the circumstances had been known to the plaintiff.*

But, whether an estate is sold by auction, or by private agreement, equity will be as vigilant in discovering an excuse for refusing to perform the contract, where the price is inadequate, as it will where the consideration is unreasonable (*p*).

(*n*) Cadman *v.* Horner, 18 Ves. jun. 10; Wall *v.* Stubbs, 1 Madd. 80.

(*o*) Anon. 1 Bro. C. C. 158; 6 Ves. jun. 24, cited; but see 2 Atk. 134.

(*p*) Whorwood *v.* Simpson, 2 Vern. 186; Emery *v.* Wase, 5 Ves. jun. 846; 8 Ves. jun. 505; Twining *v.* Morris, 2 Bro. C. C. 326; and see the cases cited in n. (*a*), *supra*; and see Mortlock *v.* Buller, 10 Ves. jun. 292.

III. A conveyance executed will not, however, be easily set aside on account of the inadequacy of the consideration; for there is a great difference between establishing and rescinding an agreement (*q*). It is not sufficient to set aside an agreement in equity, to suggest weakness and indiscretion in one of the parties who has engaged in it; for supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing only, unless he can show fraud in the party contracting with him, or some undue means made use of to draw him into such an agreement (*r*). To set aside a conveyance, there must be an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it (*s*). The truth is, that in setting aside contracts, on account of an inadequate consideration, the Court proceeds on fraud. In all such cases, however, the basis must be gross inequality in the contract, otherwise the party selling cannot be said to be in the power of the party buying; unless actual imposition is proved by gross inequality, other circumstances of fraud will pass for nothing; the basis must be gross inequality (*t*).

But a conveyance obtained for an inadequate consider-

(*q*) See Dews *v.* Brandt, Sel. Chs. Ca. 7; Cases *Dom. Proc.* 1728; Hamilton *v.* Clements, Cas. Dom. *Proc.* 1766.

(*r*) *Per* Lord Hardwicke, Willis *v.* Jernegan, 2 Atk. 251.

(*s*) *Per* Lord Thurlow in Gwynne *v.* Heaton, 1 Bro. C. C. 1; and see Stephens *v.* Bateman, 1 Bro. C. C. 22; Floyer *v.* Sherard, Ambl. 18; Heathcote *v.* Paignon, 2 Bro. C. C. 167, and the cases there cited; Spratley *v.* Griffiths, 2 Bro. C. C. 179, n.; Low *v.* Barchard, 8 Ves. jun. 133; Underhill *v.* Horwood, 10 Ves. jun. 209; 14 Ves. jun. 28; Venner *v.* Winstanley, 2 Scho. and Lef. 393; Mac Ghee *v.* Morgan, Bruce *v.* Rogers, *ib.* 395; Darley *v.* Singleton, 1 Wight. 25; Evans *v.* Brown, *ib.* 102; *Ex parte* Thistlewood, 1 Rose, 290.

(*t*) *Per* Lord Thurlow in Gartside *v.* Isherwood, 1 Bro. C. C. 558.

ation,

ation, from one not conusant of his right, by a person who had notice of such right, will be set aside, although no actual fraud or imposition is proved (*u*).

So if advantage is taken of the distress of the vendor, the sale will be set aside (*x*); and this was done in one case, although the purchaser was really run to great hazard, and was to be at great expense and trouble in many foreseen and unavoidable law-suits about the estate, the issue of which was very doubtful (*y*).

The reader will perceive that in this chapter a distinction is taken between contracts in *fieri*, and contracts actually executed; but in the case of Coles *v.* Trecothick (*z*), Lord Eldon appears to have been of opinion, that no such distinction exists. His lordship said, that unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not a sufficient ground *for refusing a specific performance.*

IV. In treating of inadequacy of price, we must be careful to distinguish the cases of reversionary interests, the rules respecting which, especially where an heir is the vendor, depend upon principles applicable only to themselves, and not easily definable (*a*). The heir of a family

(*u*) See Evans *v.* Luellyn, 2 Bro. C. C. 150; and the cases cited in the next note.

(*x*) Herne *v.* Meers, 1 Vern. 465; 1 Bro. C. C. 176, n.; Gould *v.* Okenden, 4 Bro. P. C. by Toml. 193; Farguson *v.* Maitland, Gro. and Rud. of Law and Eq. p. 89, pl. 1; Pickett *v.* Loggon, 14 Ves. 215; Murray *v.* Palmer, 2 Scho. and Lef. 474.

(*y*) Gordon *v.* Crawford, before the House of Lords; Gro. and Rud. of Law and Eq. pl. 92, pl. 16; Printed Cases *Dom. Proc.* 1730.

(*z*) 9 Ves. jun. 234; *sed qu.* and see the cases cited in this chapter.

(*a*) See 9 Ves. jun. 243; 2 Pow. Contr. 181; 3 Wooddes. 460, p. 7; Gilb. Lex Prætor, 291; 1 Trea. Eq. c. 11, s. 12, and Mr. Forblanque's notes, *ibid.*

dealing

g for an expectancy in that family, shall be distin-
d from ordinary cases, and an unconscionable bar-
ade with him, shall not only be looked upon as
sive in the particular instance, and therefore
d, but as pernicious in principle, and therefore re-
d (*b*). There are two powerful reasons why sales of
ions by heirs should be discountenanced; the one,
opens a door to taking an undue advantage of an
ing in distressed and necessitous circumstances (*c*),
may perhaps be deemed a private reason: the other
ded on public policy, in order to prevent an heir
haking off his father's authority, and feeding his
agancies by disposing of the family estate (*d*). Every
f this nature must, however, depend on its own
stances; the Courts profess not to lay down any
ular rules, lest devices should be framed to evade

circumstance of the heir being unprovided for, will
vail much in the purchaser's favour: the remoteness
ertainty of the interest is not material, if the terms
easonable; nor can much stress be laid upon the
ser incurring the risk of the loss of his money, in
e heir die before he come into possession; nor will
quiescence of the seller during the continuance of
me situation in which he entered into the contract
lice him (*e*).

r Lord Thurlow, 1 Bro. . See Nott *v.* Hill, 1 Vern. Vern. 27; Berney *v.* Pitt, 14; Earl of Ardglasse *v.* mp, 1 Vern. 237; Twisle- Griffith, 1 P. Wms. 310; *v.* Milner, 3 P. Wms. 293, Sir John Barnardiston *v.* , 2 Atk. 133; Baugh *v.* Prince, 1 Wils. 320; Gwynne *v.* Heaton, 1 Bro. C. C. 1; Bernal *v.* Donegal, 3 Dow. 133.

(*c*) Sir John Barnardiston *v.* Lingood, 2 Atk. 133.

(*d*) Cole *v.* Gibbons, 3 P. Wms. 290. See Barnard. Cha. Rep. 6.

(*e*) Gowland *v.* De Faria, 17 Ves. jun. 20.

The

The adequacy of the consideration is considered with reference to the time of the contract and not to the event, and the burden lies on the *purchaser* in these cases to show that a full and adequate consideration was paid (*f*).

A very anxious protection is also extended by equity to persons selling reversionary interests, who are not heirs, although certainly the same reasons do not occur in support of it (*g*).

But a *bond fide* sale of a reversionary estate cannot be set aside, whether the vendor be an heir or not (*h*), unless fraud or imposition be expressly proved, or be implied from the inadequacy of the consideration, or other circumstances attending the sale (*i*), although in a late case it was deemed sufficient to avoid the contract (*k*), that the consideration was not equal to the calculated value in the tables. If the bill be delayed for a great length of time (*l*), or the vendor, with full notice of all the circumstances, and of his right to set aside the contract, confirm the purchase (*m*), equity will not relieve against the sale, although the aid of the Court could not originally have been withheld.

(*f*) Gowland *v.* De Faria, *ubi sup.*; Evans *v.* Griffith, Farmer *v.* Wardell, 17 Ves. jun. 24, cited; Medicot *v.* O'Donel, 1 Ball and Beatty, 156.

(*g*) Wiseman *v.* Beake, 2 Vern. 121; Cole *v.* Gibbons, 3 P. Wms. 290.

(*h*) Dews *v.* Brandt, Sel. Ca. Cha. 8; and see 1 Bro. C. C. 6.

(*i*) Nicols *v.* Gould, 2 Ves. 422; Gwynne *v.* Heaton, 1 Bro. C. C. 1; Peacock *v.* Evans, 16 Ves. jun. 512.

(*k*) Gowland *v.* De Faria, 17 Ves. jun. 20. The decision was appealed from, but the suit was compromised by Gowland (the seller) paying the costs and a sum of money to De Faria (the purchaser) beyond the sum decreed to him at the Rolls.

(*l*) Moth *v.* Atwood, 5 Ves. jun. 845; but see Roche *v.* O'Brien, 1 Ball and Beatty, 330.

(*m*) Cole *v.* Gibbons, 3 P. Wms. 290; Chesterfield *v.* Janssen, 1 Atk. 301; 2 Ves. 549. See Bangh *v.* Price, 1 Wils. 320; Morse *v.* Royal, 12 Ves. jun. 355; Roche *v.* O'Brien, 1 Ball and Beatty, 330.

Where

Where a sale is set aside on account of the inadequacy of the consideration, it is upon the principle of redemption, and the conveyance will stand as a security for the principal and interest, and even costs (*n*); but compound interest will not be allowed, however long the purchaser has been kept out of his money (*o*); in many cases, therefore, the seller is not merely relieved against the contract, but a considerable benefit is given to him at the expense of the purchaser. In a late case where interest had been paid on the purchase money, the payments were considered to be of principal and not interest, and the seller was charged with interest on all the sums received by him, whether received as interest or as principal (*p*).

So the purchaser will be allowed for lasting and valuable improvements, and will not like a mortgagee be charged with what without wilful default he might have made (*q*).

The rules on this head have a strong tendency to stop altogether the sale of reversions; but as this is not possible, they must necessarily have the effect of preventing the sale of reversions at their fair market value. It is perfectly well known that reversions upon sales, even by auction, fetch on an average only two-thirds of the sum at which they are valued in the tables: according to the late case of Gowland *v.* De Faria (*r*), this does not seem

(*n*) Twisalton *v.* Griffith, 1 P. Wms. 310; Gwynne *v.* Heaton, 1 Bro. C. C. 1; Peacock *v.* Evans, 16 Ves. jun. 512; Bowes *v.* Heaps, 3 Ves. and Bea. 117; but in Nicols *v.* Gould, 2 Ves. 423, Lord Hardwicke thought he could not set aside the purchase without making the purchaser pay costs; and see Baugh *v.* Price, 1 Wils. 320; Gowland *v.* De Faria, 17 Ves. jun. 20; Morony *v.* O'Dea, 1 Ball and Beatty, 109, and the Reporters' note; and Wood *v.* Alvey, 3 Madd. 417.

(*o*) Gowland *v.* De Faria, 17 Ves. jun. 20.

(*p*) Murry *v.* Palmer, 2 Scho. and Lef. 474.

(*q*) S. C.

(*r*) *Supra*, p. 238, and note. See *Ex parte* Thistlewood, 1 Rose, 290.

to

to operate in a purchaser's favour, although the value of a thing is at last not to be regulated by calculation, but as it is vulgarly termed by what it will fetch. Experience has shown, that under the most favourable circumstances, reversions will not fetch their calculated value, which only allows the purchaser five per cent. interest, notwithstanding that his money may be locked up for many years. It seems therefore an equity not founded on reason or convenience, which in these cases inquires the calculated value of the subject of the contract instead of its value according to the well known market price. The effect of such an equity must ultimately be to injure the very persons in whose favour it was introduced. Reversions will never fetch their calculated value. Fair purchasers will not dare to purchase them at their market price, and consequently they will be thrown into the grasp of usurers, who will give very inadequate considerations for them, running the risk of a suit, in which event they will stand in as good a situation as if they had given the fair market price for them.

In a late case (*s*) the Vice-Chancellor held, that the rule did not extend to sales by auction. His Honour said that the principle of the rule could not be applied to sales of reversion by *auction*. There being no treaty between vendor and purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser. The sale by auction is evidence of the market price. It was said that pretended sales by auction may be used to cover private bargains; where such cases occur, they will operate nothing.

So the same judge held, that the rule did not apply to a sale by a father, tenant for life, and his son tenant in tail in remainder, for they form a vendor with a present

(*s*) Shelly v. Nash, 3 Madd. 232.

interest,

interest, and meet a purchaser with the same advantages as if a single person had the whole power over the estate (*t*).

It must be remarked, that we have no certain rule by which the inadequacy of a consideration can be ascertained. Our law, indeed, hath in one instance (*u*) adopted the rule of the civil law; by which no consideration for an estate was deemed inadequate, which exceeded half the real value of the estate; and Lord Nottingham stated the rule universally prevailed in England (*v*).

If it be agreed, that the price of an estate shall be fixed by a third person, and such person accordingly name the sum to be paid for the estate, equity will compel a performance in *specie*; but if the referee do not act fairly, or a valuation be not carefully made, execution of the contract will not be compelled; especially if there be any other ground upon which the Court can fasten, as a bar to its aid (*w*).

By the civil law, also, a price was considered sufficiently certain, if it was to be fixed by a person named, and such person accordingly fixed the sum: but it appears by the Institutes (*x*), "*Inter veteres satis abundeque hoc dubitatur, constare inter venditio, an non.*"

If an agreement be made to sell at a fair valuation, the Court will execute it although the value is not fixed. For no particular means of ascertaining the value are pointed out, there is nothing to preclude the Court from adopting any means adapted to that purpose (*y*).

(*t*) Wood v. Abrey, 3 Madd. 417.

(*u*) *Vide* Duke, 177; *et infra*, ch. 10; and see Baldwin v. Rochford, 2 Ves. 517, cited.

(*v*) See Nott v. Hill, 2 Cha. Ca. 120; 1 Treat. Eq. 119; Grotius *de jure Belli ac Pacis*, L. 2, c. 12, s. 12.

(*w*) Emery v. Wase, 5 Ves. jun. 340; 8 Ves. jun. 505; Hall v. Warren, 9 Ves. jun. 605.

(*x*) III. xxiv. 1. For the cases arising out of this rule, *vide* Vinnius, 674.

(*y*) See 14 Ves. jun. 407.

But where parties agree upon a specific mode of valuation, as by two persons, one chosen by each, unless the price is fixed in the way pointed out, the Court cannot enforce the performance of the agreement, for that would be not to execute their agreement, but to make a new one for them (*z*).

In this respect our law accords with the civil law (*a*). The same rule is adopted in the code Napoleon (*b*). After stating that the price ought to be fixed by the parties, it adds, "Il peut cependant être laissé à l'arbitrage d'un tiers: si le tiers ne veut ou ne peut faire l'estimation il n'y a point de vente."

If the medium of arbitration or umpirage is resorted to for settling the terms of a contract and fails, equity has no jurisdiction to determine that though there is no contract at law, there is a contract in equity. If, therefore, the instrument assume that the award shall bind the parties personally, the death of one of them before the award will of course be a countermand of the submission at law, and equity cannot enforce the contract (*c*). So if the arbitrators are named, and one party refuses to execute the arbitration bond, as it is not certain that any award will ever be made, equity will not interfere; for the relief sought is a specific performance by the defendant conveying at such price as the arbitrators named shall hereafter fix, and no award may ever be made (*d*). But a party may bind himself by acquiescing in an award not made in the manner required (*e*).

(*z*) Milnes v. Gery, 14 Ves. jun. 400; Gregory v. Mighell, 18 Ves. jun. 328; Gourlay v. Duke of Somerset, 19 Ves. jun. 429. See Pritchard v. Ovey, 1 Jac. and Walk. 396.

(*a*) *Vide supra.*

(*b*) Code Civil, Liv. 3, Tit. 6, ch. 1, s. 1592.

(*c*) Blundell v. Brettargh, 17 Ves. jun. 232; and see 6 Ves. jun. 34.

(*d*) Wilks v. Davis, 3 Mer. 507.

(*e*) See 17 Ves. jun. 241.

SECTION II.

Of the Failure of the Consideration before the Conveyance.

A VENDEE, being equitable owner of the estate from time of the contract for sale, must pay the consider- n for it, although the estate itself be destroyed between agreement and the conveyance; and on the other hand, will be entitled to any benefit which may accrue to the te in the interim (*f*).

Nevertheless this doctrine, however it may seem to flow n the rules mentioned in the preceding chapter, has er been decided till lately.

or in Stent *v.* Baily (*g*), the Master of the Rolls said, I should buy a house, and before such time as by articles I am to pay for the same, the house be burnt n by casualty of fire, I shall not in equity be bound the house (*h*)."

o upon a sale of a leasehold for lives (*i*), previously to conveyance, one of the lives dropped; and although d Keeper Wright decreed a specific performance, yet report states, that he seemed to think, that if *all* the s had been dropped before the conveyance, it might e been another consideration, for that the money was e paid for the conveyance, and no estate being left, e could be no conveyance.

) See 2 Pow. on Contracts, 61.
) 2 P. Wms. 220.
) As to accidents before the contract, unknown to the parties, see p. 229.
(*i*) White *v.* Nutt, 1 P. Wms. 62.

The case of Cass *v.* Rudele, as it is reported in Vernon (*j*), is an authority against the *dictum* of the Master of the Rolls, in Stent *v.* Baily; but it appears (*k*) that the case is mis-stated in Vernon, and that the decree was founded on a good title having been conveyed.

In a late case (*l*), however, where *A* had contracted for the purchase of some houses which were burned down before the conveyance, the loss was holden to fall upon him, although the houses were insured at the time of the agreement for sale, and the vendor permitted the insurance to expire without giving notice to the vendee; Lord Eldon being of opinion, that no solid objection could be founded on the mere effect of the accident; because, as the party by the contract became in equity the owner of the premises, they were his to all intents and purposes (I). This decision proceeded on the only principle upon which it can be supported—that the purchaser was in equity owner of the estate. And therefore, in a case where a similar accident happened to an estate sold before a Master, and the

(*j*) 2 Vern. 280.

(*k*) See 1 Bro. C. C. 157, n.; and see note to Raith. edit. of Vernon.

(*l*) Paine *v.* Meller, 6 Ves. jun. 349; and see Poole *v.* Shergold, 2 Bro. C. C. 118; Revel *v.* Hussey, 2 Ball and Beat. 280; Harford *v.* Purrier, 1 Madd. 532.

(I) In the 2d vol. of Coll. of Decis. p. 56, are the two following cases:—The peril of a house sold, and thereafter burnt, was found to be the buyer's, though the disposition bore an obligement to put the buyer in possession, because the buyer did voluntarily take possession and to build the house, and likewise was enfeoffed before the burning. Hunter *v.* Wilsons.—A house bought being burnt, the Lords found, that the property being transferred to the buyer, by his being enfeoffed, and the keys being offered to him, the accidental loss must follow the buyer, although there was a part of the price unpaid, there being a difference about it, which was referred to some friends to be determined, and which they had not done when the burning happened. Atchison *v.* Dickson.

report

report had only been confirmed *nisi*, the loss was holden to fall on the vendor (*m*).

Lord Eldon's decision in Paine *v.* Meller, exactly accords with the doctrine of the civil law. Indeed it is remarkable, that this very case is put in the Institutes (*n*). '*Cum autem emptio et venditio contracta sit, periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque si—aut ædes totæ, vel aliqua ex parte, incendio consumptæ fuerint—emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere.*"

It is hardly necessary to remark, that although the Court will enforce a specific performance, notwithstanding the estate is destroyed, yet this will not be done unless the title be good, or the purchaser has, previously to the accident, waved any objections to it.

The case of Paine *v.* Meller may be considered as having also settled, that a purchaser would be entitled to any benefit accruing to the estate after the agreement, and before the conveyance; for Lord Eldon said, "If a man had signed a contract for a house upon that land which is now appropriated to the London Docks, and that house was burnt, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it."

This also appears to have been admitted in a case (*o*) where a man contracted for the purchase of a reversion, and afterwards the lives dropped before the contract was carried into execution; for, although the Court did not decree a

(*m*) *Ex parte* Minor, 11 Ves. jun. 559. *Vide* p. 50. See Zagury *v.* Furnell, 2 Campb. 240.

(*n*) III. xxiv. 3. Read Puff. *de Jure Naturæ et Gentium*, l. 5, c. 5, s. 3.

(*o*) Spurrier *v.* Hancock, 4 Ves. jun. 667; and see 1 P. Wms. 62.

specific performance, they proceeded entirely on the laches and trifling conduct of the purchaser, and never even hinted that the contract should not be performed on account of the lives having dropped.

Indeed this point flows from the *decision* in Paine *v.* Meller; and it was the rule of the civil law, that the purchaser should benefit by the accretion to the estate before the conveyance: *nam et commodum ejus esse debet cujus periculum est* (*p*).

These cases suggest the observation that, in agreements for the purchase of houses, some provision should be made for their insurance until the completion of the contract.

II. It equally follows, from the general rule of equity, by which that which is agreed to be done is considered as actually performed, that if a person agree to give a contingent consideration for an estate, as an annuity for the life of the vendor, and the vendor die before the conveyance is executed, by which event the annuity ceases, yet the purchaser will be entitled to a specific performance of his contract. This, we observe, is a much stronger case than that before discussed. There a loss was actually sustained, and the only question was, upon whom it should fall. But in this case, if performance of the agreement were not compelled, the parties would stand in precisely the same situation as before the contract; whereas, by performing the agreement, the estate is given to the purchaser, without his paying any consideration for it. A steady adherence to principle compels the Court to overlook the hardship of this particular case, and the doctrine rests upon high authority.

(*p*) Inst. *ubi sup.*

Thus

Thus in the case of Mortimer *v.* Capper (*q*), *A* contracted to sell an estate to *B* for 200*l.*, and 50*l.* a year annuity; and two days after the contract was reduced into writing, *A* was found drowned; the Lord Chancellor directed an inquiry as to the value of an annuity for the life of *A*, in order to introduce the question, whether an estate being disposed of for an annuity, which is a contingency, the contract shall fall to the ground, if no payment of the annuity shall be made. He said, that he thought, if the price were fair, the contract ought not to be cut down, merely because the annuity, which was a contingent payment, never became payable.

The parties in the above cause were so well satisfied with the opinion of the Court, that they never, it is said, brought it back for further directions (*r*).

So in a later case (*s*), where *A* sold an estate by auction in consideration of a life annuity (I), the first payment to be made on the 25th of December 1787; but in case he should die before the 29th of September 1787, up to which time he was to receive the rents, the contract should be void. *A* died on the 1st of February 1788, after a sudden and short illness of only two days; and owing to some delays, the conveyances were not executed. The quarter's payment, due at Christmas, was tendered to the vendor's agent by the purchaser, a few days after it became due; but the agent declined receiving it, saying, that the conveyance would be soon completed, and that it was not necessary for the purchaser to make such payment in the mean time. On the first hearing, Lord Thurlow said, he did not see that if an annuity was contracted for,

(*q*) 1 Bro. C. C. 156. See Wyvill v. Bishop of Exeter, 1 Price, 292.

(*r*) See 3 Bro. C. C. 609, *sed qu.*

(*s*) Jackson *v.* Lever, 3 Bro. C. C. 605.

(I) See Appendix, No. 12, for a statement of the new Annuity Act, and an inquiry into the expediency of raising the legal rate of interest.

why the consideration should not be paid. It was, he said, objected, that the contract could not be carried into execution *modo et forma*, and that had great weight where there had been no payment. His Lordship afterwards made his decree for a specific performance, on payment of the arrears of the annuity, the consideration for the purchase of the estate.

The case of Paine *v.* Meller bears on this point also. Lord Eldon, in delivering judgment, said, that as to the annuity cases, and all others, the true answer had been given; that the party has the thing he bought, *though no payment may have been made*; for he bought subject to contingency. And in the later case of Coles *v.* Trecothick, his Lordship expressed the same opinion (*t*).

But if in a case of this nature, a payment of the annuity become due before the death of the vendor, and the purchaser *neglect to make or tender it*, he cannot insist upon a specific performance.

This was decided by the case of Pope *v.* Root (*u*). *A* contracted with *B* for the sale of an estate to him, in consideration of a life annuity, and the completion of the agreement was delayed by the illness of a mortgagee, who was to have been paid off. Two days after the time mentioned for completing the purchase, *A* met with an accident, and died within a few days. By the terms of the contract, the first payment of the annuity became due previously to the death of *A*, but it was not paid or tendered. And Lord Chancellor Bathurst dismissed the bill for a specific performance, and the decree was affirmed in the House of Lords (*v*), (I).

(*t*) See 9 Ves. jun. 246.
(*u*) 7 Bro. P. C. 184.
(*v*) See Lord Bathurst's decision in Baldwin *v.* Boulter, 1 Bro. C. C. 156, cited.

(I) One writer has thought, that the inadequacy of the consideration influenced this decision; see 2 Pow. on Contracts, 76; but it does not appear that any inadequacy was actually proved.

The

The reader will observe, that the decisions in the cases of Mortimer *v.* Capper and Jackson *v.* Lever, do not infringe upon that of the House of Lords, in the prior case of Pope *v.* Root, but reduce the rules on this subject to an equitable and uniform standard; for the only case in which a purchaser cannot require the assistance of equity, is where he has by laches forfeited his right to its aid, namely, where a payment of the annuity became due, and he neglected to pay or tender it.

To obviate all doubt, it seems advisable in agreements for purchase, where the consideration is an annuity for the life of the vendor, to expressly declare, that the death of the vendor, previously to the completion of the contract, shall not put an end to it, although a payment of the annuity shall not have become due, or having become due, shall not have been made or tendered; but that, on the contrary, the purchaser shall be entitled to a conveyance, on payment of the annuity up to the death of the vendor.

In the cases just dismissed, the *purchaser*, by the death of the vendor, obtained the estate without paying any, or only a nominal consideration for it. Perhaps a case may arise where the vendor having received the purchase money, may, by the death of the purchaser, be entitled to retain the estate also, although he may not be his heir. This case was put in the argument of Burgess *v.* Wheate (*x*): a purchase, and the money paid by the purchaser, who dies without heir, before any conveyance. It was said, if the lord could not claim the estate, and pray a conveyance, the vendor would hold the estate he has been paid for, and keep the money too. Sir Thomas Clarke, in delivering his opinion, said, that he thought the lord could not

(*x*) 1 Blackst. 123.

pray

pray the conveyance; to say he could was begging the question. And as to the vendor's keeping both the estate and the money, it was analogous to what equity does in another case; as where a conveyance is made prematurely, before money paid, the money is considered as a lien on that estate in the hands of the vendee. So where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor, for the personal representatives of the purchaser; which would leave things in *statu quo*.

It may be doubted, however, whether this case, if it should ever arise, would be decided according to Sir Thomas Clarke's opinion. Where a lien is raised for purchase money under the usual equity (*y*), in favour of a vendor, it is for a debt really due to him, and equity merely provides a security for it. But in the case under consideration, equity must not simply give a security for an existing debt; it must first *raise* a debt against the express agreement of the parties. The purchase money was a debt due to the vendor, which upon principle it would be difficult to make him repay. What power has a court of equity to *rescind* a legal contract like this? The question might perhaps arise if the vendor was *seeking* relief in equity, but in this case he must be a defendant. If it should be admitted that the money cannot be recovered, then of course he must retain the estate, also, until some person appear who is by law entitled to require a conveyance of it.

(*y*) *Vide infra*, ch. 12.

CHAPTER VI.

OF THE PARTIAL EXECUTION OF A CONTRACT, WHERE A VENDOR HAS NOT THE INTEREST WHICH HE PRETENDED TO SELL; AND OF DEFECTS IN THE QUANTITY AND QUALITY OF THE ESTATE.

SECTION I.

Where the Vendor has not the Interest which he sold.

WHERE a person sells an interest, and it appears hat the interest which he pretended to sell was not the ue one; as, for example, if it was for a less number of ears than he had contracted to sell, the purchaser may nsider the contract at an end, and bring an action for oney had and received, to recover any sum of money hich he may have paid in part performance of the agreeent for the sale: and the vendor offering to make an llowance *pro tanto*, will make no difference; it is suffiient for the plaintiff to say, it is not the interest which I greed to purchase (*a*).

But in a late case (*b*) at *nisi prius*, where the agreement as to sell "the unexpired term of eight years lease and ood will," &c. and it appeared, that, at the date of the greement, the unexpired term in the lease was only

(*a*) Farrer *v.* Nightingal, 2 Esp. a. 639; and see Hearn *v.* Tomn, Peake's Ca. 192; Thomson *v.* liles, 1 Esp. Ca. 184; Mattock *v.* lunt, B. R. 15 Feb. 1806; Hibbert *v.* Shee, 1 Campb. Ca. 113. See also Duffell *v.* Wilson, *ib.* 401; and see ch. 8, *infra*.

(*b*) Belworth *v.* Hapell, 4 Camp. Ca. 140.

seven

seven years and seven months, Lord Ellenborough said, that the parties could not be supposed to have meant that there was the exact term of eight years unexpired, neither more nor less, by a single day. The agreement must, therefore, receive a reasonable construction, and it seems not unreasonable that the period mentioned in the agreement should be calculated from the last preceding day when the rent was payable, and including, therefore, the current half year. Any fraud or material misdescription, though unintentional, would vacate the agreement, but the defendant might here have had substantially what he agreed to purchase.

So where a house was sold by auction, and no notice was taken of a fee-farm rent of 5*s*. 4*d*. charged upon that and upon other property, to a very great amount, the purchaser brought an action for breach of the agreement, and Sir Vicary Gibbs for the vendor, the defendant, declined arguing the point (*c*).

And where a particular described the subject of sale to be an annuity of so much, payable out of the tolls of Waterloo Bridge, the Court considered that the purchaser would make some inquiry as to the annuity; but as the Bridge Act did not speak of any power to redeem the annuities to be granted, *and the annuity was made subject to redemption*, it was held that the contract was not binding on the purchaser; and the Court was of opinion, the sellers should be strictly bound to disclose the real nature of the subject of the contract (*d*).

But, notwithstanding that the vendor has a different interest to what he pretended to sell, equity will, in some cases, compel the purchaser to take it.

(*c*) Turner *v*. Beaurain, Sitt. Guildh. cor. Lord Ellenborough, C.J. 2d. June 1806; and see Barnwell *v*. Harris, 1 Taunt. 430.

(*d*) Coverley *v*. Burrell, M. T. 1821, B. R. MS.

Thus,

us, although the estate is charged with trifling incum-
es, which cannot be discharged, yet it seems that,
some circumstances, if a satisfactory indemnity can
en against them, equity will compel a specific per-
nce (*e*), (I). This, however, is evidently a jurisdic-
hich cannot be too cautiously exercised. In a late
Lord Eldon said, that he did not apprehend, that the
could compel the purchaser to take an indemnity,
vendor to give it (*f*).

lthough the vendor may not be entitled to the estate
number of years which he contracted to sell, yet,
deficiency were not great, equity would certainly
a performance of the contract at a proportionable
(*g*).

t if the number of years be considerably less than the
r pretended to sell, equity, so far from interfering in
vour, will assist the purchaser in recovering any de-
which he may have paid.

us, in Long *v.* Fletcher (*h*), *A* pretending he had a
f sixteen years to come, in a house, agreed to sell it
and *B* paid 100*l.* part of the consideration money,

B entered, but finding that *A* had only a term of
ars in the house, brought his bill to have an account,
oney refunded, and the bargain set aside; and ac-
gly *B* was decreed to account for the profits, and

owland *v.* Norris, 1 Cox, ley *v.* Grant, Horniblow y, 13 Ves. jun. 73. 81; Barnwell *v.* Harris, 1 30; see also Hays *v.* Bai- ed in ch. 7. *post*. Wood *v.* 19 Ves. 220.

(*f*) See 1 Ves. and Beam. 225.

(*g*) See Guest *v.* Homfray, 5 Ves. jun. 818; and see Hanger *v.* Eyles, 21 Vin. Abr. (A), pl. 1; 2 Eq. Ca. Abr. 689; see also 10 Ves. jun. 306; 13 Ves. jun. 77.

(*h*) 2 Eq. Ca. Abr. 5. pl. 4.

lthough it seems evident that this equity would be enforced in a r instance, like Turner *v.* Beaurain, yet the cases referred to decisive authorities in favour of it.

the

the consideration money to be refunded, and *B*, upon his own account, to have tenant allowances made him.

So, if a purchaser contract for what is stated to be an original lease, and it turn out to be an underlease for the whole term, wanting a few days, it should seem that equity would not compel the purchaser to perform the contract. It is impossible, from the nature of the thing, to make any compensation for the reversion outstanding, and yet it may become very valuable; and it is of great importance to a purchaser of a lease not to have any third person stand between him and the owner of the inheritance (*i*).

It frequently happens that a contract for a leasehold estate is not carried into execution at the time appointed, and the vendor continues in possession. The estate, of course, daily decreases in value, and a question constantly arises, whether the purchaser shall be compelled to pay the full price originally agreed to be given for the estate, or what arrangement shall be made between the parties.

In a late case (*j*), where this point arose, the late Master of the Rolls said, the reasonable course which he should adopt, was, that for the time elapsed before the execution of the agreement, in consequence of the pendency of the suit, interest should be paid by the purchaser, and a rent should be set upon the premises in respect of the possession of the vendor.

This rule at once provides for the interests of both parties, and accords with the maxim of equity, by which that which is agreed to be done, is considered as actually performed. The purchase money, from the time of the contract, belongs to the vendor, who is entitled to interest on it while it is retained by the purchaser. The estate from

(*i*) *Vide infra*, where an underlease will be enforced against a vendor under an agreement to assign, div. II.

(*j*) Dyer *v.* Hargrave, 10 Ves. jun. 505. See and consider King *v.* Wightman, 1 Anst. 80; Fenton *v.* Browne, 14 Ves. jun. 144.

the

e time belongs to the purchaser, who is entitled to
or it while it is occupied by the vendor.
uthbert *v.* Baker (*k*), the quit rents of a manor were
n the particulars of sale to be 2*l.* a year, and they
ed to only 30*s.* a year; but a performance in specie
reed, and it was referred to the Master to ascer-
at compensation should be allowed in respect of the
ncy.

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re an estate is sold by auction, or before a Master,
and the vendor has not a title to all the lots sold,
will compel the purchaser to take the lots to which
can be made, if they are not complicated with the
nd will allow him a compensation *pro tanto*.
, in Poole *v.* Shergold (*l*), a man became the pur-
of several lots of an estate, to two of which no title
be made. And upon the Master's report Lord
n said, he must take it for granted, these two lots
ot so complicated with the others, as to entitle the
er to resist the whole; and therefore decreed a
performance *pro tanto*.
If a title cannot be made to a lot which is compli-
with the rest, the purchaser will not be compelled to
the lots to which a title can be made.
, in Poole *v.* Shergold, before cited, Lord Kenyon
f a purchase was made of a mansion-house in one
farms, &c. in others, and no title could be made
lot containing the mansion-house, it would be a
to rescind the whole contract.
Kenyon seems afterwards to have gone a step fur-
nd to have been of opinion, that such a contract
not in any case to be *enforced* against a purchaser.

g. Lib. A. 1790, fol. 442. (*l*) 2 Bro. C. C. 118; 1 Cox, 273.
See 6 Ves. jun. 676.

For

For sitting in a court of law (*m*) he held, that the performance of a contract for the sale of some houses ought not to be compelled, as a title could not be made to all the houses bought; and this, notwithstanding they were sold in separate lots. He said, when a party purchases several lots of this description at an auction, it must be taken as an entire contract; that is, that the several lots are purchased with a view of making them a joint concern. The seller therefore shall not, in case of any defect in his title to one part, be allowed to abandon that part at his pleasure, and to hold the purchaser to his bargain for the residue. From such a doctrine much injustice might result, as the part to which a seller could not make a title might be so circumstanced, that without it the other parts would be of little, perhaps of no value; or it might leave it in the power of the seller, or any other person who might come to the possession of such part, to deprive the purchaser of every degree of enjoyment or beneficial use of that part which he had purchased. He added, that a case under circumstances precisely similar to the present, had been decided before him, when Master of the Rolls. That, on that case coming before him, he had found that his predecessor there, Sir Thomas Sewell, had ruled contrary to the doctrine he was now delivering; but that he at the Rolls had overruled Sir Thomas Sewell's determination, with the general approbation of the bar.

And the Court of Exchequer appear to have been of the same opinion as Lord Kenyon. For in a case (*n*) where a person purchased several lots of an estate sold under a decree of the Court, and the biddings were afterwards opened as to one lot, the Court were of opinion, that he had an option to open the biddings as to the rest of the lots.

(*m*) Chambers v. Griffiths, 1 Esp. Ca. 149.

(*n*) Boyer v. Blackwell, 3 Anstr. 657.

In

In a late case (*o*), in which most of the authorities on this head were cited, the cases of Chambers *v.* Griffiths and Boyer *v.* Blackwell were not noticed; but I learn that Lord Eldon afterwards mentioned from the bench that he had met with the case of Chambers *v.* Griffiths; and he desired it to be understood, that he was not of the same opinion as Lord Kenyon; and, in a still later case, Lord Eldon expressed an opinion that Lord Kenyon's rule would not be followed unless it could be shown that there was an understanding that the purchaser was not to take any of the lots unless he could obtain them all (*p*).

The rules laid down in Poole *v.* Shergold must therefore still be considered the law of the Court. It is indeed remarkable, that in Chambers *v.* Griffiths, Lord Kenyon should have overlooked his decision in Poole *v.* Shergold; more especially as it in a great measure obviated the objections which he made to a partial execution by a court of equity of a contract for purchase of several lots of an estate. The doctrine, however, could not apply to an action at law, because although the same man purchase several lots at an auction, yet a distinct contract arises upon each (*q*). Chambers *v.* Griffiths cannot therefore be maintained as an authority even for the legal rule.

Where an estate is sold in one lot, either by private contract, or public sale, and the vendor has not a title to the whole estate, he cannot enforce the contract at law (*r*), unless perhaps a separate value was put on different parts of the estate, in which case the contract in favour of justice may be considered distinct. At law neither a vendor can, on an entire contract, recover part of the purchase money,

(*o*) Drewe *v.* Hanson, 6 Ves. jun. 675.

(*p*) 16 July 1816, MS.

(*q*) Emmerson *v.* Heelis, 2 Taunt. 38; James *v.* Shore, 1 Stark. 426.

(*r*) Tomkins *v.* White, 3 Smith, 435.

where he cannot make a title to the whole estate sold; nor would a purchaser be suffered in a court of law to say, that he would retain all of which the title was good, and vacate the contract as to the rest: such questions being subjects only for a court of equity (*s*).

But if the part to which the seller has a title was the purchaser's principal object, or equally his object with the part to which a title cannot be made, and is itself an independent subject, and not likely to be injured by the other part, equity will compel the purchaser to take it at a proportionate price; and in these cases it will be referred to the Master, to inquire, "whether the part to which a title cannot be made, is material to the possession and enjoyment of the rest of the estate (*t*)".

Thus in a case (*u*) before Sir Thomas Sewell, a man who had contracted for the purchase of a house and wharf, was compelled to take the house, although he could not obtain the wharf; as it appeared that his object was to carry on his business at the wharf (I); which, Lord Kenyon said, was a determination contrary to all justice and reason (*v*).

And in the late case of Drew *v.* Hanson (*w*), which arose upon the sale of an estate, together with the valuable corn and hay tithes of the whole parish, it appeared,

(*s*) Johnson *v.* Johnson, 3 Bos. and Pull. 162.

(*t*) M'Queen *v.* Farquhar, 11 Ves. jun. 467; Reg. Lib. B. 1804, fol. 1095; Knatchbull *v.* Grueber, 1 Madd. 153.

(*u*) See 6 Ves. jun. 678; 7 Ves. jun. 270, cited; and see M'Queen *v.* Farquhar, 11 Ves. jun. 467.

(*v*) 1 Cox, 274.

(*w*) 6 Ves. jun. 675.

(I) This case has been frequently disapproved of, and would not have been so decided at this day. See 1 Esp. Ca. 152; 6 Ves. jun. 679; 13 Ves. jun. 78. 228. 427. In Stewart *v.* Allinson, 18 Ves. jun. 26, Lord Eldon expressed himself much more strongly against the principle of these cases, than appears by the report.

that

that the principal object of the purchaser was the corn tithes, and that half the hay tithe belonged to the vicar, and the other half was commuted for by a payment of 2*l.* per annum, the nature of which did not appear. Upon the facts, as they then appeared, Lord Eldon would not give judgment, but he seemed clearly of opinion that the hay tithe, if not of great extent *or of such a nature as to prejudice the corn tithe*, was a subject for compensation: but otherwise not, as the purchaser would not get the thing which was the principal object of his contract (*x*).

So in a case (*y*) where a man had articled for the purchase of an estate tithe-free, but which afterwards appeared to be subject to tithes, Lord Thurlow decreed a specific performance, although the purchaser proved, that his object was to buy an estate tithe-free (I).

This, however, to use Lord Eldon's words (*z*), is a prodigious strong measure in a court of equity to say, as a discreet exercise of its jurisdiction, that the contract shall be performed, the defendant swearing and positively proving that he would have had nothing to do with the estate if not tithe-free. And in the case of Ker *v.* Clobery (*a*), where the estate was sold before the Master, and the particulars stated, that "the whole of the above lands are only subject to a modus for tithe hay of 2*l.* per annum," Lord

(*x*) See Vancouver *v.* Bliss, 11 Ves. jun. 458; Stapylton *v.* Scott, 13 Ves. jun. 425.

(*y*) Lord Stanhope's case, 6 Ves. jun. 676, cited; Lowndes *v.* Lane, 1 Cox, 363; 6 Ves. jun. 676, cited; but see Pincke *v.* Curties, cited *ibid.*; and see Rose *v.* Calland, 5 Ves. jun. 186; Wallinger *v.* Hilbert, 1 Mer. 104.

(*z*) See 6 Ves. jun. 679; and see 17 Ves. jun. 280.

(*a*) 26 Mar. 1814, MS.

(I) It now appears by the report of the case published by Mr. Cox, that the estate was only subject to a money-payment of 14*l.* in lieu of tithes. Howland *v.* Norris, 1 Cox, 59.

Eldon was of opinion, that a purchaser of an estate stated to be tithe-free, or subject to a modus, could not be compelled to take it with a compensation, if the estate is not tithe-free. His Lordship said, that he had so decided in a case from Yorkshire, in which he had told the purchaser if he would take the estate with a compensation, he must undertake to pay the tithes to the vendor. The question therefore is now at rest.

In a later case, upon a sale before a Master, where the particular stated *about* thirty-three acres to be tithe-free, Lord Eldon held, that the principle laid down in Ker *v.* Clobery did not apply (*b*).

In a late case, where the estate was described as let on a *ground-lease* at so much per annum, and it turned out that the lease was at rack-rent, Lord Eldon would not support the sale, although there was the usual clause, that errors or mis-statements should not annul the sale (*c*).

In a case where the particular described the estate as four hundred and twelve acres, two hundred and twenty-seven of which were tithe-free, paying a very small modus; and it appeared that part of the estate represented to be tithe-free, was subject to tithes which the owner was willing to sell, Lord Eldon said, that the allegation was, that two hundred and twenty-seven acres "are tithe-free, paying a very small modus," not stating a positive exemption from tythes; and where the contract is to sell an estate tithe-free, the vendor not representing himself to have title to the tithes, without entering into the question, whether the purchaser ought to be compelled to take it if not tithe-free; yet, if he chooses to take it, he cannot compel the vendor to buy the tithes, if there is a positive

(*b*) Binks *v.* Lord Rokeby, E. T. 1818, MS.

(*c*) Stewart *v.* Alliston, 1 Mer. 62.

title

title to them in pernancy; all he can have is compensation (*d*).

If a purchaser, with notice of a defect in a title to a part of the estate which is complicated with the rest, or which is the principal object of his contract, take possession of the estate, and prevent the vendor from making a title, he will be compelled to perform the contract, notwithstanding that he insisted upon the objection at the time he entered (*e*). A deduction from the price will, however, be allowed him, although the situation of the land will not perhaps be taken into consideration.

A purchaser will not be compelled to take an undivided part of the estate contracted for. Therefore, if a man contract with tenants in common for the purchase of their estate, and one of them die, the survivors cannot compel the purchaser to take their shares, unless he can obtain the share of the deceased.

And in a case where under a decree a person purchased two-sevenths of an estate in one lot, and a good title was only made to one-seventh, the purchaser was allowed to rescind the contract as to the whole of the lot (*f*).

Nor will a purchaser be compelled to take a leasehold estate, for however long a term it may be holden, where he has contracted for a freehold (I). Lord Alvanley expressed a clear

(*d*) Todd *v.* Gee, 17 Ves. jun. 273; *qu.* how is the compensation to be estimated? See Ker *v.* Cloisery, *supra*.

(*e*) See Calcraft *v.* Roebuck, 1 Ves. jun. 221.

(*f*) Roffey *v.* Shallcross, 4 Madd. 227.

(I) Although a purchaser cannot, and certainly ought not, to be compelled to take an estate held for a term of years, however long it may be, where he has contracted for a fee, yet a willing purchaser may safely accept it; and by the following means may gain the fee. In the first place,

a clear opinion on this point (*g*); and it has since been expressly determined by Sir William Grant (*h*), (I).

Neither is a purchaser compellable to accept a copyhold estate in lieu of a freehold (*i*), (II).

But if an estate is sold as copyhold, and represented as

(*g*) See 4 Bro. C. C. 407; 1 Ves. jun. 226.

(*h*) Drewe *v.* Corp, 9 Ves. jun. 368; and see 13 Ves. jun. 78.

(*i*) See Twining *v.* Morrice, 1 Bro. C. C. 326; and Sir Harry Hick *v.* Philips, Prec. Cha. 575.

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place, the term should be assigned to a trustee, then a feoffment of the lands should be executed; and after the feoffment, the trustee to whom the term is assigned, should declare that he will stand possessed of the lands during the term, in trust to attend the inheritance according to the uses created by the feoffment. This mode will give the purchaser a good title against all persons except the lessor, or reversioner; and as he can claim no title till the expiration of the term, the title will be substantially good against all the world, if the term be a long one. At the same time it is evident, that there are certain privileges attached to a freehold estate, which could not be claimed by the purchaser in derogation of the rights of the reversioner. Indeed this mode of making a title should only be resorted to where it is not known who is the lessor, or reversioner. See Saunders *v.* Lord Annesley, 2 Scho. and Lef. 73. There would be no difficulty in holding such a feoffment void, as fraudulent, but it would be quite impossible to hold it a forfeiture of the term in the trustee.

(I) This case is a very strong authority. The vendor was entitled to a term of four thousand years, vested in a trustee for him, and also to a mortgage of the reversion in fee expectant upon the term which was vested in himself and forfeited, but not foreclosed. The person claiming under the mortgagor of the reversion refused to release, and thereupon the bill was dismissed. Lib. Reg. A. 1803, fol. 290.

(II) In the case of Sir Harry Hick *v.* Philips, on account of the unreasonable price at which the estate was sold, a specific performance was refused, although the vendor offered to procure an enfranchisement of the copyholds. See 10 Mod. 504. But this case cannot be considered as an authority, except on the ground of the price being unreasonable, for equity will in ordinary cases grant the vendor time to procure the fee. See *infra*, ch. 8.

equal

equal in value to freehold, it seems that the vendor will be compelled to perform the contract, although the estate prove to be actually freehold (*j*). If, however, the contract for the sale of a supposed copyhold, stipulate that the sale shall be void if any part is freehold, the subject must be proved as described; and the circumstance of the seller himself, after the first contract, selling the estate to another as copyhold, is not conclusive evidence against him (*k*).

So it is said, that a purchaser of an existing lease, is not bound to take a new lease instead of the old one, because the purchaser would become an original lessee, instead of an assignee; and might therefore be subject to burdens, to which he would not have been liable in the latter character (*l*).

If a vendee proceed in the treaty for purchase after he is acquainted with the nature of the tenure, and do not object to it, he will be bound to complete his contract, and cannot claim any compensation on account of the difference in value.

Thus, where an estate was sold as freehold, with a leasehold adjoining (*m*), and it turned out on examination that sixty-two acres were leasehold, and only eight freehold; yet, as the purchaser proceeded in the treaty after he was in possession of this fact, and did not object to the nature of the property, he was held to have waved the objection.

And if a purchaser do object to the tenure, yet, if he

(*j*) Twining *v.* Morrice, 2 Bro. C. C. 326; and see Browne *v.* Fenton, *sup.* p. 3.

(*k*) Daniels *v.* Davison, 16 Ves. jun. 249.

(*l*) Mason *v.* Corder, 2 Marsh. 332.

(*m*) Fordyce *v.* Ford, 4 Bro. C. C. 494; and see 6 Ves. jun. 670; 10 Ves. jun. 508; Burnell *v.* Brown, 1 Jac. and Walk. 168.

proceed in the treaty, it seems that he will be compelled to take the estate, on being allowed a compensation (*n*).

In the case of Wirdman *v.* Kent (*o*), upon a bill filed by vendors for a specific performance, it appeared that part of the lands sold to the purchaser had been previously sold to one Pavey; a specific performance was however decreed, and, as to the lands terriered to the defendant, but which had been sold to Pavey, that the plaintiffs should procure Pavey to release them to the defendant, *or convey a like quantity of land of equal value to the defendant.*

The particular circumstances of this case do not appear in the report; but it must be presumed, that the land sold to Pavey was not the object of the purchaser; and that other land in the neighbourhood, of equal value, would suit him as well. Indeed, in one report of this case (*p*), it is said, that the grievances complained of were disregarded as frivolous.

To guard against the rules established by the foregoing decisions, an express declaration should be inserted in all agreements for purchase of estates, that if a title cannot be made to the whole estate, the purchaser shall not be bound to perform the contract *pro tanto*; and a similar provision should be made where an estate is bought free from tithes, or with any other collateral benefit, which the purchaser may wish to secure.

There may be some rights in an estate not disclosed, which, although in themselves of small value, are incapable of compensation; for example, a right of sporting reserved over the estate, and not disclosed to the purchaser; for it would not perhaps be possible to estimate what difference in value such a reservation made (*q*); and such a

(*n*) See Calcraft *v.* Roebuck, 1 Ves. jun. 221.

(*o*) 1 Bro. C. C. 140.

(*p*) 2 Dick. 594.

(*q*) Burnell *v.* Brown, 1 Jac. and Walk. 168.

right

right would break in too much upon the enjoyment and ownership of a purchaser, to enable equity with propriety to compel him to take the estate with a compensation.

II. Having considered in what cases *a vendor* may *compel* a performance *pro tanto* of an agreement, which he is unable wholly to perform; we may now inquire in what instances a *purchaser* may insist upon a part performance of an agreement, which the vendor cannot execute *in toto*.

And first, it seems that in every case where an agreement would be in part executed in favour of a vendor, there is much greater reason to afford the aid of the Court at the suit of the purchaser, if he be desirous of taking the part to which a title can be made. And a purchaser may, in some cases, insist upon having the part of an estate to which a title is produced, although the vendor could not compel him to purchase it: it is true, generally, but not universally, that a purchaser may take what he can get, with compensation for what he cannot have (*r*).

Thus we have seen, that if tenants in common contract for the sale of their estate, and one of them die, the survivors cannot compel the purchaser to take their shares, unless he can obtain the shares of the deceased. But the converse of this proposition does not hold; for it seems that a purchaser may compel the survivors to convey their shares, although the contract cannot be executed against the heir of the deceased (*s*). So even where a vendor has not a title to a part of the estate, and consequently cannot enforce the acceptance of it, yet the purchaser may elect to take it with the title such as it is (*t*).

(*r*) 1 Ves. and Beam. 358, *per* Eldon; Western v. Russell, 3 Ves. and Beam. 187.

(*s*) Attorney-general v. Gower, 1 Ves. 218.

(*t*) *Vide infra*.

If

If a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of the contract. For the person contracting under these circumstances is bound by the assertion in his contract: and if the vendee chooses to take as much as he can have, he has a right to that, and an abatement (*u*).

Therefore in a case where the estate was sold for twenty-one years, and represented as held under a church lease, usually renewed every seven years, and it appeared that the seller was only entitled for life to part; the *purchaser* filed a bill for a specific performance with a reduction. The seller insisted that the purchaser might have an option to put an end to the contract, but that he (the seller) ought not to be compelled to take less than the stipulated price. The decree, however, was for a specific performance, with a reduction of the purchase money, the interest of the seller being less valuable than it had been represented to the purchaser (*v*). Lord Eldon has since observed, that the consequence of this decision was, that if the lives should endure beyond the period of twenty-one years, the purchaser would have the premises as well as the compensation. In that respect the case was new, and deserved great consideration. The Lord Chancellor added, that in a conversation which he had with the Master of the Rolls, they inclined to think it might be right upon this reasoning, that the estate was purchased subject to a contingency affecting its immediate value; he could not carry it to

(*u*) *Per* Lord Eldon, 10 Ves. jun. 31. 516. The same doctrine was laid down by his Lordship in Wood v. Griffith, 12 Feb. 1818; and see 2 Ves. jun. 439, acc. *per* Lord Rosslyn.

(*v*) Dale v. Lister, 10 Ves. jun. 7, cited.

market,

market, he could do nothing with it that would make it absolute property in him as if he had an absolute term of twenty-one years; but as the compensation might be aggravated enormously, beyond the actual value, so it might be much too small, and the Court would throw the chances together. The only other course was to adopt the principle of indemnity, either by taking security or laying hold of part of the purchase money, with a view to compensation if the case should arise, and that was open to this difficulty, that the property held subject to the question of indemnity remains unsaleable, unmarketable, and of infinitely less value than it would otherwise be.

In a later case (*x*), upon a sale of leasehold for lives, the representation by the seller was held to amount to this: that the lessee thereof upon lives, under a church lease, granted the lease in question, with covenants, binding his real and personal representatives to procure renewals to make the complete term sold. It appeared, however, that the covenant to renew was limited, and not binding to the extent mentioned, the estate being in settlement, and the covenants not general. The *purchaser* filed a bill for a specific performance, with an allowance. In effect the difference was between a covenant by the lessor binding all his assets real and personal; and a covenant which only bound that property which the lessor might permit to go from him to his son, who would be entitled to the property under the settlement. Lord Eldon felt great doubt whether that could be made the subject of a valuation. The purchaser, however, only desired an indemnity upon a real estate, or by part of the purchase money to be kept in Court; the sellers receiving the dividends. The Lord Chancellor decreed a specific performance, and directed an inquiry what was the difference between the value of

(*x*) Milligan v. Cooke, 16 Ves. jun. 1.

the

the interest actually sold, and that represented, and such difference to be deducted from the purchase money; and if the Master should find that he was unable to ascertain such difference in value, or if the purchaser should choose to take the title with a sufficient indemnity, he might, and the decree was affirmed upon a rehearing.

But the general rule, independently of special circumstances, is, that the Court can neither compel a purchaser to take an indemnity nor a vendor to give it (*y*).

Although a purchaser may in most cases insist upon taking the interest which the vendor can give him, yet it seems that equity will not decree an under-lease on an agreement to assign, though it appear that the assignment cannot be made without a forfeiture; for the defendant, in agreeing to assign, might intend to discharge himself from covenants to which he would continue liable by the under-lease (*z*). This is, however, a defence which a vendor can seldom set up against a purchaser's claim, where the purchaser chooses to accept an under-lease; for an assignee of a lease almost invariably covenants to indemnify his vendor from the rent and covenants in the lease, and from these covenants he cannot of course discharge himself by an assignment, any more than by an under-lease.

So it has been determined by Lord Redesdale, that where, at the time of the contract, the purchaser is fully aware that the vendor cannot execute the agreement, and, consequently, cannot enforce the performance of it; there the agreement must be presumed to have been executed under a mistake, and the purchaser cannot insist upon a

(*y*) 1 Ves. and Beam. 225; *vide post*, ch. 7; Paton v. Brebner, 1 Bligh, 66.

(*z*) Anon. E. T. 1790; Fonbl. n. (*r*), to 1 Trea. Eq. 211, 2d edit. See Mason v. Corder, 2 Marsh. 332.

performance

performance as to the interest to which the vendor may be actually entitled (*a*).

And in a case where a tenant for life, with a power of leasing for twenty-one years at a rack-rent, agreed to execute a lease for twenty-one years, and a further lease for twenty-one years at any time during his life, consequently to execute a lease for twenty-one years, whatever might be the increased value of the property at the time the lease should be granted; Lord Redesdale considered it a contract to act in fraud of the power, and that the lessee was not entitled to a specific performance. To obviate this objection, the lessee offered to take a renewed lease for twenty-one years, if the lessor should so long live; but Lord Redesdale thought that this was one of those cases where the plaintiff had no right thus to qualify the contract he insisted upon: there was nothing in the case to show that satisfaction in the form of damages was not an adequate remedy for him. If he had been put into a situation from which he could not extricate himself, the defendant might be called on to make the best title in his power, but nothing could be more mischievous than to permit a person who knows that another has only a limited power, to enter into a contract with that other person, which, if executed, would be a fraud on the power, and when that was objected to, to say, "I will take the best you can give me." A court of equity ought to say, to persons coming before it in such a way, "make the best of your case with a jury (*b*)."

It should be observed that there was another point in the above cause, and the decree was pronounced after considerable doubts. It seems difficult to reconcile the opinion

(*a*) Lawrenson *v.* Butler, 1 Scho. and Lef. 13. See Mortlock *v.* Buller, 10 Ves. jun. 292.

(*b*) Harnet *v.* Yeilding, 2 Scho. and Lef. 549; *vide supra*, p. 193.

expressed

expressed by Lord Redesdale with the current of authorities. It was not a necessary consequence of the contract that the lease agreed to be granted would be a fraud on the power, and the purchaser was willing to take the interest which the seller was enabled to grant without risk to himself or injury to the remainder-men.

If in a case of this nature, the purchaser, on the faith of the agreement, put himself in a situation from which he cannot extricate himself, and is therefore willing to forego a part of his agreement, that is a circumstance to induce a court of equity to give relief. Thus, in a case before Lord Thurlow, the incumbent of a living had, with full knowledge of the title, contracted with the tenant in tail, in remainder after a life estate, for the purchase of the advowson, and on the faith of that agreement had built a much better house than he would otherwise have done; the tenant for life would not join in suffering a recovery, and consequently a good title could not be made. Lord Thurlow held, that as the purchaser had, upon the faith of the contract, built a good house on the glebe, he ought to have the utmost the vendor could give him; and therefore directed the vendor to convey a base fee, by levying a fine with a covenant to suffer a recovery whenever he should be enabled to do so by the death of the tenant for life (*c*).

If the vendor has granted a lease of the estate which is void by force of a statute, the Court will not, on the request of the purchaser, consider the lease as valid, and allow him a compensation in respect of it (*d*).

(*c*) Lord Bolingbroke's case, cited 1 Scho. and Lef. 19, n. (*a*).

(*d*) Morris *v.* Preston, 7 Ves. jun. 547.

SECTION II.

Of Defects in the Quality of the Estate.

In most cases on this head, the rule "*caveat emptor*" applies, and therefore, although there be defects in the estate, yet, if they are patent, the purchaser can have no relief (*e*).

Thus, where a meadow was sold without any notice of a footway round it, and also one across it, which of course lessened its value, Lord Rosslyn decreed a specific performance with costs, as *he could not*, he said, *help the purchaser who did not choose to inquire* (*f*). *It was not a latent defect.* Lord Manners has said, that he believed the bar was not very well satisfied with the decision, although, as he observed, the purchaser was undoubtedly extremely negligent not to look at the estate before he purchased it (*g*).

And here a case (*h*) may be introduced, where the subject of the contract was a house on the north side of the river Thames, supposed to be in the county of Essex, but which turned out to be in Kent; a small part of which county happens to be on the other side of the river. The purchaser was told he would be made a churchwarden of Greenwich, when his object was to be a freeholder of Essex; yet he was compelled to take the house.

This decision, however, seems to be opposed by a case

(*e*) See the introductory Chapter, and see Lowndes *v.* Lane, 2 Ves. 363.

(*f*) Oldfield *v.* Round, 5 Ves. 508.

(*g*) 1 Ball and Beatty, 250; and see Legge *v.* Croker, *ib.* 506.

(*h*) Shirley *v.* Davies, in the Exchequer, 6 Ves. jun. 678, cited.

before

before Lord Talbot. An agreement was entered into for the purchase of a house for a coffee-house. It was found that a chimney could not be made convenient for a coffee-house; but nevertheless, the vendor filed a bill against the purchaser, to compel him to perform the agreement. Lord Talbot dismissed the bill, merely because the tenant would be obliged to take it for a purpose he did not want (*i*).

But it may be remarked, that it is no bar to a specific performance, that the conveyance will not have the operation which the vendor thought it would. Thus where a tenant for life of a copyhold purchased the reversion in the hope of extinguishing contingent remainders, and afterwards finding that the conveyance would not affect the remainders, brought a bill to be relieved against the security which he had given for the purchase money; the Court gave him his option either to pay the principal, interest and costs, or to have his bill dismissed with costs (*j*).

So in a case where, under the *legal construction* of the terms of an agreement for a lease, the option to determine the lease was in the lessee only, and it was argued against a specific performance, that this was contrary to the intention, the Master of the Rolls said that a specific performance of a written agreement cannot be denied, because the meaning of the parties does not appear (*k*).

But where a vendor gives a false description of the estate, the purchaser may a law rescind the contract. As if an estate is stated to be but one mile from a borough town, and it turns out to be between three and four, the contract is voidable by the purchaser (*l*). And the same rule must

(*i*) 1 Ves. 307; and see 13 Ves. jun. 78.

(*j*) Mildmay v. Hungerford, 2 Vern. 243.

(*k*) Price v. Dyer, MS.; Rolls S. C. 17 Ves. jun. 356.

(*l*) Duke of Norfolk v. Worthy, 1 Camp. Ca. 337; *vide supra*, p. 35; and see Fenton v. Browne, 14 Ves. jun. 144; —— v. Christie, 1 Salk. 28, by Evans; Trower v. Newcome, 3 Mer. 704.

prevail

prevail in equity where the misdescription, as in this case, is not from the nature of it a subject of compensation.

So in a case where the estate was described to have lately undergone a thorough repair, whereas it was in a complete state of ruin, and ordered to be pulled down by the district surveyor, the purchaser was allowed to rescind the contract (*m*). And where the state of the repairs was falsely represented by the seller, knowing that the house had the dry-rot, without communicating that fact to the purchaser, upon a bill filed by the seller, a specific performance was decreed with a compensation to the purchaser (*n*).

So where the purchaser of a leasehold house was aware of the ruinous state of the premises, but no mention was made at the sale by auction of a notice to repair given to the vendor by the lessor, on the day before the sale, under which the lessor re-entered and evicted the purchaser, he (the purchaser) was permitted to recover the deposit from the auctioneer, on the ground that in such transactions good faith was most essential, and the vendor or his agent was bound to communicate to the vendee, the fact of such notice (*o*).

But if the purchaser knew that the description was false, he cannot, it seems, take advantage of it either at law or in equity.

Thus, in a case before Sir William Grant (*p*), where an estate was described as being within a ring fence, it appeared, that the estate was intersected by other lands, and did not answer the description, but that the purchaser knew the situation of the estate; his Honor (after expressing a doubt whether such an objection was a subject of compensation, as it was not certain that a precise pecu-

Keyes v. Rutherford, K. B. 1809.

Grant v. Munt, Coop. 173.

(*o*) Stevens v. Adamson, 2 Stark. 422.

(*p*) Dyer v. Hargrave, 10 Ves. jun. 505.

niary value could be set upon the difference between a farm compact in a ring fence, and one scattered and dispersed with other lands,) said, that the purchaser was clearly excluded from insisting upon that as an objection to complete the contract. He saw the farm before he purchased; he had lived in the neighbourhood all his life. This variance was the object of sense; he must have known whether the farm did lie in a ring fence or not; and upon the same ground, that the purchaser could not get rid of the contract on account of the difference in the description of the farm, his Honor determined he could not be entitled to compensation. If a compensation was given to him, he would get a double allowance; for if he had knowledge that what he proposed to purchase did not answer the description, it must be taken that he bid so much the less.

This case, we observe, went a step further than either the case before the Court of Exchequer, or that before Lord Rosslyn, in neither of which was there any warranty or false description. But in this case it was expressly stated, that the whole estate was within a ring fence; but the Master of the Rolls thought that circumstance immaterial, as the purchaser knew the description was false; and his Honor appears to have grounded his decision on the doctrine, that even at law a warranty is not binding where the defect is obvious, and put the cases of a horse with a visible defect, and a house without a roof or windows warranted as in perfect repair.

But where a particular description is given of the estate, which turns out to be false, and the purchaser cannot be proved to have had a distinct knowledge of the actual state of the subject of the contract, he will be entitled to a compensation, although he may be compelled to perform the contract.

Thus, in the case before the Master of the Rolls, the particular

particular described the house as being in good repair, and the farm as consisting of arable and marsh land, in a high state of cultivation. It appeared, however, that the house was not in good repair, and that the land was not in a high state of cultivation. The judgment contains the facts of the case, and is highly satisfactory. His Honor said, "These objections are such as a man may have an indistinct knowledge of, and he may have some apprehension that, in those respects, the premises do not completely correspond with the description, and yet the description may not be so completely destroyed as to produce any great difference in his offer. As to the marsh land, it is very uncertain, whether, by any view, it was possible for him to judge of that. It is stated by many witnesses, that the season of the year was just at the breaking of a frost, and represented that no man could, at that time, say whether the land was well or ill cultivated. So he may have seen some trifling defects in the house, and might not intend to make the objection if they turned out to be nothing more than they appeared upon the surface. He might consider them too trivial, and not mean to claim compensation for an objection so insignificant. But afterwards, when he came to examine, according to this evidence, he discovered that the house was materially defective, and very much out of repair. Admitting that he might, by minute examination, make that discovery, he was not driven to that examination; the other party having taken upon him to make a representation: otherwise he would be exonerated from the consequence of that in every case where, by minute examination, the discovery could be made. The purchaser is induced to make a less accurate examination by the representation which he had a right to believe. This purchaser, therefore, is entitled to compensation for the defects of the house, and the cultivation of the marsh land."

But notwithstanding that the foregoing case has established, that the repairs necessary to a house are a subject of compensation, although the house is described to be in good repair, yet his Honor seemed to admit, that if the purchaser wanted possession of the house to live in at a given period, by which time the repairs could not be completed, he ought not to be bound to complete the contract (*q*).

Where the defect is a *latent* one, and the purchaser cannot by the greatest attention discover it, if the vendor be aware of it, and do not acquaint the purchaser with the fact, he may set aside the contract at law, although he bought the estate *with all faults* (*r*); and equity will not enforce a specific performance (*s*).

This was decided at law by Lord Kenyon at *nisi prius*, upon the sale of a ship. It was insisted, for the seller, that the rule *caveat emptor* applied; but Lord Kenyon said, that there are certain moral duties, which philosophers have called duties of imperfect obligation, such as benevolence to the poor, and many others, which courts of law do not enforce. But, in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith. This was a latent defect, which the plaintiffs could not, by any attention whatever, possibly discover; and which the defendants knowing of ought to have disclosed to the plaintiffs. The terms to which the plaintiffs acceded, of taking the ship with all faults, and without warranty, must be understood to relate only to those faults which the plaintiffs could have discovered, or which the defendants were unacquainted with.

In a late case (*t*), the same point arose before Lord Ellenborough at *nisi prius*; but ultimately it was not ne-

(*q*) *Vide infra*, ch. 8.

(*r*) Mellish *v.* Motteux, Peake's Ca. 115.

(*s*) Oldfield *v.* Round, 5 Ves. jun. 508.

(*t*) Baglehole *v.* Walters, 3 Camp. Ca. 154. See 1 Bell and Beaty, 515.

cessary

cessary to decide it. Lord Kenyon's decision was cited. Lord Ellenborough said, that he could not subscribe to the doctrine of that case, although he felt the greatest respect for the authority of the Judge by whom it was decided. Where an article is sold *with all faults*, he (Lord Ellenborough) thought it was quite immaterial how many belonged to it within the knowledge of the seller, *unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser*. The very object of introducing such a stipulation is, to put the purchaser on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent. A man may be possessed of a horse he knows to have many faults, and wish to get rid of him, for whatever sum he would fetch. He desires his servant to dispose of him; and, instead of giving a warranty of soundness, to sell him *with all faults*. Having thus laboriously freed himself from responsibility, is he to be liable, if it be afterwards discovered that the horse was unsound? Why did not the purchaser examine him in the market when exposed to sale? By acceding to buy the horse with all faults, he takes upon himself the risk of latent or secret faults, and calculates accordingly the price which he gives. It would be most inconvenient and unjust if men could not, by using the strongest terms which language affords, obviate disputes concerning the quality of the goods which they sell. In a contract such as this, his Lordship thought there was no fraud, unless the seller, by positive means, renders it impossible for the purchaser to detect latent faults; and he made no doubt, that this would be held as law when the question should come to be deliberately discussed in any court of justice.

In a still later case upon the sale of a ship. The parcular stated, amongst other things, that the hull was nearly as good as when launched. And after stating when she was to be seen, added, " with all faults as they now lie."

Then followed an inventory of the stores, to which the following declaration was added, "the vessel and her stores to be taken with all faults as they now lie, without any allowance for weight, length, quality, *or any defect whatsoever*." The ship was quite unseaworthy. She belonged to underwriters to whom she had been abandoned. The agents for the sale must have known her defects, and she was kept constantly afloat, so that her defects could not be discovered. The person who framed the particular had not examined the vessel (*u*). Mansfield, C. J. said that these words were very large, to exclude the buyer from calling upon the seller for any defect in the thing sold, but if the seller was guilty of any positive fraud in the sale, these words will not protect him. There might be such fraud either in a false representation, or in using means to conceal such defect. He thought the particular was evidence here by way of representation, that states the hull to be nearly as good as when launched, and that the vessel required a most trifling outfit. Now, was this true or false? If false, it was a fraud, which vitiates the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent says, that he framed this particular without knowing any thing of the matter. But it signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if, in point of fact, it turns out to be false. But, besides this, it appears here, that means were taken fraudulently to conceal the defects in the ship's bottom. These must have been known to the captain, who was to be considered the agent of the owners, and he evidently, to prevent their being discovered by persons disposed to bid for her, removed her from the

(*u*) Schneider v. Heath, 3 Camp. Ca. 506.

ways

ways where she lay dry, and kept her afloat in the dock till the sale was over. Therefore, consistently with the decided cases upon this subject, the learned judge was of opinion, that the purchaser was entitled to recover back his deposit.

In a case which occurred a fews months before, upon the sale of a ship, where the Court held that, in point of fact, there was no fraud, Mr. Justice Heath said, that the meaning of selling "with all faults" is, that the purchaser shall make use of his eyes and understanding to discover what faults there are. He admitted that the vendor was not to make use of any fraud or practice to conceal faults. The learned Judge adhered to the doctrine of Lord Ellenborough, above-stated, without any difficulty. Mr. Justice Chambre held, there must be evidence of fraud to enable the Court to depart from the written agreement. Mr. Justice Gibbs agreed with Lord Ellenborough's doctrine. Even if there had been a representation it would not have availed. He held, that if a man brought him a horse, and made any representation whatever of his quality and soundness, and afterwards they agreed in writing for the purchase of the horse, that shortened and corrected the representations, and whatsoever terms were not contained in the contract would not bind the seller. But the learned Judge agreed that *fraud* would not be done away by the contract, and he mentioned the case of a sale of a house, where the seller being conscious of a defect in a main wall plastered it up and papered it over, and it was held, that as the seller had expressly concealed it, the purchaser might recover (*x*). As the law now stands, unless there be actual fraud, the written contract cannot be avoided.

But the ground and basis of an action in a case of this

(*x*) Pickering v. Dowson, 4 Taunt. 779. See Jones v. Bowden, *ib.* 847.

nature, for recovery of a deposit, where the contract is *in fieri*; or of damages, where the contract is actually executed, is the *scienter*; and, therefore, if the vendor was not aware of the defect, he will not be answerable for it. Nor will trifling defects be sufficient foundation for such an action.

Thus, in a case (*y*) where a purchaser brought an action against a vendor, to recover damages for having sold him a house, knowing it had the dry-rot; it appeared, that the house was situated in a clayey soil, and that the floor lay near the ground, by which some of the timbers had rotted; but the vendor was not aware of the defects, and the purchaser was nonsuited. Lord Kenyon said, the circumstances that had been proved in this case might be described by a word that was used by one of the witnesses; they were mere *bagatelles*. If these small circumstances were to be the foundation of an action, every house that was sold would produce an action. If a broken pane of glass that might be found in a garret window, perhaps, had not been described by the seller, it would be the ground of an action. If he was to consider himself as a witness in the cause, he could say he had met with something of this kind, and he never thought himself imposed upon, because now and then some rotten boards and rotten joists might be found about a house. Besides, there was no imposition, no *mala fides* in this case.

Although the purchaser might, with proper precaution, have discovered the defect; yet if, during the treaty, the vendor *industriously* conceal the fact, equity will not assist him.

Thus, upon a suit for a specific performance, the defence was, that the estate was represented to the defendant as clearing a net value of 90*l.* per annum, and no notice

(*y*) Bowles v. Atkinson, N. P. MS.

was

was taken to him of the necessary repair of a wall to protect the estate from the River Thames, which would be an out-going of 50*l.* per annum. And it appearing, upon evidence, that there had been an *industrious concealment* of the circumstances of the wall during the treaty, the Lord Chancellor dismissed the bill, but without costs (*z*).

And here a case may be mentioned, where an estate appeared to be subject to a right of entry to dig for mines; the *purchaser* did not object to the title on this ground, but insisted upon a specific performance with a compensation, which was accordingly decreed (*a*).

SECTION III.

Of Defects in the Quantity of the Estate.

If a purchaser of an estate thinks he has purchased *mala fide* a part which the vendor thinks he has not sold, that is a ground to set aside the contract, that neither party may be damaged; because it is impossible to say, one shall be forced to give that price for part only which he intended to give for the whole; or that the other shall be obliged to sell the whole for what he intended to be the price of part only (*b*). Upon the other hand, if both understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so, if the buyer did not imagine he was buying any more than the seller imagined he was selling the part in question, then a presence to have the whole conveyed is as contrary to good

(*z*) Shirley v. Stratton, 1 Bro. C. C. 440.

(*a*) Seaman v. Vawdrey, 16 Ves. jun. 390.

(*b*) See 13 Ves. jun. 427; and see Higginson v. Clowes, 15 Ves. jun. 516, stated, as to this point, *supra*, p. 27.

faith

faith on his side, as a refusal to sell would be in the other case (*c*).

If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation, although the estate was estimated at that number in an old survey (*d*).

The rule is the same though the land is neither bought nor sold professedly by the acre; the presumption is, that in fixing the price, regard was had on both sides to the quantity which both suppose the estate to consist of. The demand of the vendor, and the offer of the purchaser, are supposed to be influenced in an equal degree by the quantity, which both believe to be the subject of their bargain. The general rule therefore is, that where a misrepresentation is made as to the quantity, though innocently, the right of the purchaser is to have what the vendor can give, with an abatement out of the purchase money, for so much as the quantity falls short of the representation (*e*).

But where the lands *in a conveyance* are mentioned to contain so many acres *by estimation*, or the words "more or less" are added, if there be a small portion more than the quantity, the vendor cannot recover it; and if there be a small quantity less, the purchaser cannot obtain any compensation in respect of the deficiency (*f*). Indeed, a case is said to have been decided, where a man conveyed his land by the quantity of one hundred acres, were it more or less, and it was not above sixty acres; but the purchaser had no relief, because it was his own laches (*g*).

(*c*) *Per* Lord Thurlow. See 1 Ves. jun. 211; and see 6 Ves. jun. 339.

(*d*) Sir Cloudesly Shovel *v.* Bogan, 2 Eq. Ca. Abr. 688, pl. 1.

(*e*) Hill *v.* Buckley, 17 Ves. 394. *Per* Sir William Grant.

(*f*) Twyford *v.* Warcup, Finch, 310. See Marquis of Townshend *v.* Stangroom, 6 Ves. jun. 328; Rushworth's case, Clay. 46; Neale *v.* Parkin, 1 Esp. Ca. 229.

(*g*) Anon. 2 Freem. 106.

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That however was the case of an actual conveyance. Where the contract rests *in fieri*, the general opinion has been that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contain the words *more or less*, or *by estimation* (*h*.)

But in a late case, where the estate was stated to contain *by estimation* forty-one acres, *be the same more or less*; and upon an admeasurement, the quantity proved to be only between thirty-five and thirty-six acres; and the purchaser claimed an abatement: the late Master of the Rolls decided against the claim. His Honor said, that the effect of the words "more or less" added to the statement of quantity had never been yet absolutely fixed by decision; being considered sometimes as intending to cover only a small difference the one way or the other; sometimes as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it. In this instance, the description was rendered still more loose by the addition of the words "by estimation." The estimated extent of ground frequently proves quite different from its contents by actual admeasurement. It cannot be contended, that the terms "estimated" and "measured" have the same meaning. If a man was told that a piece of land was never measured, but was estimated to contain forty-one acres, would that representation be falsified, by showing that, when measured, it did not contain the specified number of acres? The only contradiction to that proposition would be, that it had not been estimated to contain so much (*i*).

(*h*) Hill *v.* Buckley, 17 Ves. 394. (*i*) Winch *v.* Winchester, 1 Ves. and Beam. 375.

The

The case of Day *v.* Fynn (*k*), however seems a considerable authority, that at least the words *more or less* ought only to clear a small deficiency where the contract rests *in fieri*. There, in ejectment, the plaintiff declared on a lease for years of a house, and thirty acres of land in *D*; and that *J. S.* did let to him the said messuage and thirty acres, by the name of his house in *B*, and ten acres of land there, *sive plus sive minus*: it was moved in arrest of judgment; because that thirty acres cannot pass by the name of ten acres, *sive plus sive minus*; and so the plaintiff had not conveyed to him thirty acres, for when ten acres are leased to him *sive plus sive minus*, these words ought to have a reasonable construction to pass a reasonable quantity, either more or less, and not twenty or thirty acres more. Yelverton agreed, for the word ten acres, *sive plus sive minus*, ought to be intended of a reasonable quantity, more or less, by a quarter of an acre, or two or three at most; but if it be three acres less than ten, the lessee must be contented with it. *Quod* Fenner and Crook *concesserunt*, and judgment was staid.

But however the rule may be finally settled, yet a seller knowing the true quantity, would not be allowed to practise a fraud, by stating a false quantity, with the addition of the words "more or less," or the like (*l*).

If an estate be represented as containing a given quantity, although not professedly sold by the acre, the circumstance that the purchaser was intimately acquainted with the estate, would not necessarily imply knowledge of its exact contents; while a particular statement of the quantity would naturally convey the notion of actual admeasurement; and therefore the Court would not be warranted

(*k*) Owen, 133; and see the cases cited above.

(*l*) See Duke of Norfolk *v.* Worthy, 1 Cam. Ca. 337; *supra*, p. 35 and 1 Ves. and Beam. 377.

in

n inferring that the purchaser knew the real quantity (*m*). 'or, if the purchaser did know the real quantity, of course e could not claim any allowance for the deficiency.

The principle upon which an abatement in these cases s made, is, to place the parties in the situation in which hey would have stood, if there had been no misrepre-entation. Therefore, where a man purchased a wood, hich was, by mistake, represented to contain nearly enty-six acres more than it did, but the purchaser was, n the course of the negotiation, furnished with the value of he woods *qud* wood, so that he obtained the right quantity f wood but not of soil, the abatement was decreed to be nly so much as soil covered with wood would be worth, fter deducting the value of the wood (*n*).

Where lands are shown to a purchaser as part of his urchase, he will be entitled to them, although expressly xcepted in his conveyance by name, provided he did not now them by that name (*o*).

So if a man purchase an estate by a particular, and in he conveyance part of the land is left out, equity will elieve him (*p*); but it must be clear that he did purchase y the particular, because it is not a writing within the tatute of frauds; and, therefore, unless that be the case, r the agreement can be otherwise proved, the Court annot relieve (*q*).

On the other hand, the Court will equally relieve a endor, where more land has passed than was contracted

(*n*) Winch v. Winchester, 1 Ves. and Beam. 375.

(*o*) Hill v. Buckley, 17 Ves. jun. 394.

(*o*) Oxwick v. Brockett, 1 Eq. Ca. Abr. 355, pl. 5.

(*p*) Prec. Cha. 307, *arguendo*; and see Nelson v. Nelson, Nels. Cha. Rep. 7.

(*q*) Cass v. Waterhouse, Prec. Cha. 29. See Clinan v. Cooke, 1 Scho. and Lef. 22; and see ch. 3, *supra*; and 2 Dow. 301.

for;

for; although in an early case (*r*) (I) this relief was denied; because the defendant was a purchaser upon valuable consideration. But it is now clear, that if land be expressly conveyed, or pass by general words, which was not mentioned in the particular by which the purchase was made, or was not intended to be conveyed, the purchaser will be decreed to re-convey it (*s*).

And where a purchaser took a conveyance of an estate from his own instructions, he was held not to be entitled to lands answering the general description in the advertisements of sale, but which were not included in his conveyance, nor in a more particular description from which he prepared his instructions (*t*).

To come to a right conclusion on this branch of our subject, we must be informed that an acre does not always contain the same superficial quantity of land. The word acre at first denoted, not a determined quantity of land, but any open ground or field. It afterwards signified a measured portion of land, but the quantity varied, and was not fixed until the statute (II) *de terris mensurandis* (*u*), according to which an acre contains one hundred and sixty square perches; so that every acre is a superficies of forty perches long, and four broad; or in that proportion,

(*r*) Clifford v. Laughton, Toth. 83.

(*s*) Tyler v. Beversham, Finch, 80; 2 Cha. Ca. 195. See Gibson v. Smith, Barnard, Cha. Ca. 491.

(*t*) Calverley v. Williams, 1 Ves. jun. 210.

(*u*) 33 Edw. I.; and see 24 H. VIII, c. 4; 2 Inst. 737; Co. Litt. 69, a; Spelm. Gloss. v. *Acra, particata terræ, pertica, pes forestæ, rods terræ.* Cow. Interp. v. Acre.

(I) Probably the defendant had purchased without notice from the first purchaser.

(II) It was formerly holden not to be a statute, but only an ordinance. Stowe's case, Cro. Jac. 603; but this has since been overruled. Rex v. Everard, 1 Lord Raym. 638.

be

be the length or breadth more or less. The length of the perch was, previously to the statute of Edward, fixed at five yards and a half, or sixteen feet and a half, by the statute called *compositio ulnarum et perticarum* (*x*), and the act of Edward must of course be construed with reference to this standard. Lord Kenyon seems to have thought it impossible to contend, that a custom should prevail that a less space of ground than an acre should be called an acre (*y*); but in several places the perch is measured with rods of different lengths, and notwithstanding Lord Kenyon's *dictum*, *consuetudo loci est observanda* (*z*), so that a greater or less space of ground than a statute acre may, in compliance with the custom of the place where the land lies, be called an acre. In some places the perch is measured by a rod of twenty-four feet, in some by one of twenty feet (*a*), and in others by one of sixteen feet (*b*). And we are now to inquire in what cases the custom of the country in this respect shall or shall not prevail.

In adversary writs the number of acres are accounted according to the statute measure (*c*), but in fines, and common recoveries, which are had by agreement and consent of parties, the acres of land are according to the customary and usual measure of the country, and not according to the statute (*d*).

(*x*) See 4 Inst. 274.

(*y*) Noble *v.* Durell, 3 T. Rep. 271; and see Hockin *v.* Cooke, 4 T. Rep. 314; Master of St. Cross v. Lord Howard de Walden, 6 T. Rep. 338.

(*z*) 6 Rep. 67, a.

(*a*) Crompt. on Courts, 222, who cites a case in the Exchequer, related to him by one of the Barons; and also 47 E. III, [fo. 18, a, pl. 35]; and see Barksdale *v.* Morgan, 4 Mod. 185.

(*b*) Co. Litt. 5, b. See Dalt. c. 112, s. 25.

(*c*) Andrew's case, Cro. Eliz. 476, cited.

(*d*) Sir John Bruyn's case, 6 Co. 67, a, cited; Waddy *v.* Newton, 8 Mod. 276. See Floyd *v.* Bethill, 1 Roll. Rep. 420, pl. 8; and see Treswallen *v.* Penhules, 2 Rolle's Rep. 66; 12 Vin. 240.

So,

So, which is more to our present purpose, where a man agrees to convey (*e*), or actually conveys (*f*) any given number of acres of land, which are known by estimations or limits, there the acres shall be taken according to the estimation of the country where the land lies, be they more or less than the measure limited by the statute; for they pass as they are there known, and not according to the measure by statute.

But if a man possessed of a close containing twenty acres of land by estimation, which is not eighteen, grant ten acres of the same land to another, there the grantee shall have ten acres according to the measure fixed by the statute, because the acres of such a close are not known by parcels, or metes and bounds, and so this case differs from the one immediately preceding it (*g*). And it is said, that if one sells land, and is obliged that it contain twenty acres, the acres shall be taken according to the law, and not according to the custom of the country (*h*).

(*e*) Some *v.* Taylor, Cro. Eliz. 665.

(*f*) 47 E. III, 18, a, pl. 35; 6 Co. 67, a; Morgan *v.* Tedcastle, Poph. 55; Floyd *v.* Bethill, 1 Rolle's Rep. 420, pl. 8; Andrew's case, Cro. Eliz. 476, cited.

(*g*) Morgan *v.* Tedcastle, Poph. 55.

(*h*) Wing *v.* Earle, Cro. Eliz. 267.

CHAPTER VII.

THE TITLE WHICH A PURCHASER MAY REQUIRE.

PURCHASER has a right to require a title coming at least sixty years previously to the time of his base; because the statute of limitations (*a*) (I) could a shorter period confer a title. In Paine *v.* Meller (*b*), Eldon seemed to be of opinion, that an abstract not further back than forty-three years, was a serious tion to the title.

ven sixty years are not sometimes sufficient. For nce, if it may reasonably be presumed from the con- of the abstract, that estates tail were subsisting, the haser may demand the production of the prior title. statutes of limitations cannot in such case be relied remainder-men having distinct and successive rights, which at least the statute of James can only begin perate as they fall into possession. It may be thought in the common case of a man claiming by descent, a sion expectant upon particular estates created by his stor's will, that a writ of right will not lie after sixty from his ancestor's death, although the particular

(*a*) 32 Hen. VIII. c. 2; 21 Jac. I. *Vide post*; and see Barnwell *v.* Harris, 1 Taunt. 430.

(*b*) 6 Ves. jun. 349.

(I) The courts however are so anxious to protect a long possession, no plaintiff is entitled to so little favour as a plaintiff in a writ of See Charlwood *v.* Morgan, Baylis *v.* Manning, 1 New Rep. 64, Maidment *v.* Jukes, 2 New Rep. 429.

estates have but recently determined. But however this may be, the objection still remains, for an ejectment may be brought at any time within twenty years after the estate falls into possession.

So, if an abstract begin with a conveyance by a person who is stated to be heir at law of any person, the purchaser may require proof of the ancestor's intestacy.

To pursue this point is, in this place, impracticable, so numerous are the cases in which counsel are compelled to require the production of the prior title.

Of course a purchaser may, after notice of a defect in the title, by his conduct wave the objection; but Lord Eldon has determined, that where an abstract is laid before counsel who approves the title, his approbation is not to be taken as against the person consulting him, as a waver of all reasonable objections. The Court cannot compel a specific performance, upon the ground of an opinion which it may think wrong. The purchaser may either take an opinion from some other counsel, or the one first consulted may correct his error in a further opinion (*c*). This, it may be observed, was always the understanding of the profession.

II. Under this head we must consider the much agitated point, whether a purchaser of a leasehold estate can insist upon the production of the lessor's title.

The general practice of the profession is to call for an abstract of the title, but a lessee is not often able to comply with the demand. At the time the lease is granted, the title is rarely investigated, or even thought of; and a lessor cannot be advised voluntarily to submit his title to the examination of strangers. As my Lord Eldon remarked (*d*),

(c) Deverell v. Lord Bolton, 18 Ves. 505.

(*d*) 8 Ves. jun. 141.

the

his Newcastle case is a good lesson upon this subject of production. The corporation produced their charters to satisfy curiosity; some persons got hold of them, and the consequence was, the corporation lost 7,000*l.* a year.

The numerous cases in the books where lessees, and persons claiming under them, have been evicted on account of defects in the titles of their lessors, strongly evince the danger of taking a lease without investigating the landlord's title. No title can be depended upon, however long the estate may have been in the same family. There may be a defect in a settlement, or the person in possession may have a partial estate only, with a power of leasing. All the leases of the Pulteney estate were set aside on account of a power of leasing not having been duly pursued; nor is this the only estate of which the leases have been vacated. Besides, without an abstract of the title, a purchaser cannot even ascertain that the lessor had not mortgaged the estate previously to granting the lease, in which case (as against the mortgagee) the lessee, and consequently any purchaser from him, would be a mere tenant at will (*e*); and his only remedy would be either to redeem the mortgage, or to bring an action on the lessor's covenant for quiet enjoyment.

A lessee is a purchaser *pro tanto*, and it should therefore seem that *he* is not only entitled to call upon the lessor for an inspection of his title, but would not meet with any favour if he neglected to do so; for no one's misfortune is so much slighted by the courts as his, who buys a thing in the realty, and does not look into the title (*f*). In Keech *v.* Hall (*g*), Lord Mansfield appears to have taken

(*e*) Keech v. Hall, Dougl. 21.

(*f*) See Roswel v. Vaughan, Cro. Jac. 196; and Lysney v. Selby, 2 Lord Raym. 1118.

(*g*) Dougl. 21; and see Waring v. Mackreth, For. Ex. Rep. 129; 11 Ves. jun. 343.

it for granted, that a lessee has a right to examine the title deeds. The case of Gwillim *v.* Stone (*h*), seems to lean the other way, although there, the plaintiff seems to have mistaken his remedy, and the decision in effect only was, that a man entering under an agreement for a lease, before the lease is granted, cannot call upon the other party to reimburse him his loss in case a title cannot be made: although certainly Mr. Justice Lawrence appears to have thought, that the mere agreement to grant the lease, did not warrant an implied agreement to make a good title, or to deliver an abstract.

In a later case (*i*), Gibbs, C. J. thought at *nisi prius*, that the defendant was not bound to deliver an abstract under a bare agreement to grant a lease for twenty-one years; and Mr. Justice Heath, after instancing the case of leases for three lives, granted some years since in Devonshire, by a Duchess of Bolton, who was mere tenant for life, but assumed to have a power of leasing, and received fines to the amount of 29,000*l.*, observed, that nevertheless it had never yet been heard of, that a tenant for life was asked to show his title to lease. The instance quoted shows the strong necessity of the title being produced; and there is no instance in which a man acting under good advice, accepts a title from a tenant for life, without the production of the settlement under which he claims. However, in this case, the Court considered that the cause originated in a dispute between the two attornies, and the judges expressed their desire not to decide the point, without affording an opportunity for a review of their judgment.

In the last case on this subject, where the agreement was made to take a lease for twenty-one years at rack rent, the

(*h*) 3 Taunt. 433.

(*i*) Temple *v.* Brown, 6 Taunt. 60.

late

late Master of the Rolls decided, that the intended lessor, *who was plaintiff*, could not enforce a specific performance, without producing the original lessor's title (*j*). But it still remains undecided, whether a *lessee* can, as plaintiff, call for the original lessor's title.

The argument generally urged against the purchaser's right to call for the lessor's title is, that a lessee is seldom able to produce the title; and, therefore, on the ground of convenience, a purchaser must be presumed to know this circumstance, and to buy, subject to an implied condition, not to call for the freehold title. But the answer to this is, that the lessor's title is now generally required; and where the vendor cannot produce the title, it is usual to state the fact in the particulars or agreement. Therefore, where that statement is omitted, it is fair to presume that the vendor is in possession of the title. There can be no inconvenience in establishing the purchaser's right to call for the freehold title; for the vendor has it in his power to prevent the claim by an express stipulation.

Of course, if a vendor of a leasehold estate be unable to procure the lessor's title, equity cannot assist the purchaser (*k*), unless he will dispense with the production of the title to the freehold.

The question under consideration arose in a recent case in the Court of Chancery, and Lord Eldon avoided deciding the abstract point, although he certainly appears to have thought that the better rule would be, that the purchaser is, in the absence of an express stipulation to the contrary, entitled to the production of the lessor's title. He intimated, however, that if ever it should be his duty to decide a question so important, he would call in the judges to his assistance.

(*j*) Fildes *v.* Hooker, 2 Mer. 424; Lord Ossulston *v.* Deverell, 26 May 1818, MS.

(*k*) *Vide supra*, p. 192.

The case before Lord Eldon has decided that the vendor cannot demand a specific performance if the purchaser can show that the title to the freehold is not good, or that there are any incumbrances on it; nor will equity afford its aid against the purchaser, where the nature of the leasehold title is misrepresented. The facts were these: the interest was described as fifty years, the residue of a term free from incumbrances, whereas it appeared that there were only sixteen years to come of the old lease granted by Sir Richard Grosvenor in 1722, and the residue of the fifty years was granted by the trustees of Lord Grosvenor in 1791, as a reversionary term for thirty-four years. It appeared that, in 1785, the estate in question was charged with jointures, mortgages, &c. Lord Eldon held, that in these cases a purchaser should at least know accurately what he is buying; that in the case before him, the title produced did not correspond with that contracted for; and that there was a wide difference between the residue of a lease that has existed for a century with possession under it, and a small residue of an old term, and a reversionary lease granted by persons whose title from the first lessor is not deduced. He also thought that he was bound to look at the incumbrances, and therefore dismissed the bill, but without costs (*l*).

And, as we have seen, in the later case of Fildes v. Hooker, it was determined generally, that a lessee cannot, as *plaintiff*, require a specific performance, without showing a good title to the freehold.

(*l*) White v. Foljambe, 11 Ves. jun. 337; Deverell v. Lord Bolton, 18 Ves. 505; and see Radcliffe v. Warrington, 12 Ves. jun. 326. Lady Saltoun v. Philips, sittings after T. T. 1813, cor. Lord Ellenborough, where a purchaser recovered his deposit, because the seller claimed his lease subject to Lord Grosvenor's incumbrances, and had stated that the lease was only subject to the ground-rent, although he had not undertaken to produce the landlord's title.

Since

And this authority was followed in the case of Purvis v. Rayer (*m*) in the Exchequer. An agreement was entered into on the 15th May 1819, between John Goldsborough Ravenshaw (as the agent of Purvis) of the one part; and William Rayer of the other part; whereby Ravenshaw agreed to sell, and Rayer agreed to purchase a house in Bath, held for the remainder of a term of years under the corporation of Bath and the late Richard Atwood, at the sum of 1,500*l.*; an abstract to be made and delivered by Purvis, and the assignment to be at the expense of Rayer. The purchase money to be paid on or before Midsummer, when the deeds were to be signed. The ground-rent and all out-goings to Midsummer to be paid by Purvis, from whence the same were to be paid by Rayer. The bill was filed by the seller, and the title was referred to the Master, who reported that the plaintiff could not make a good title to the said leasehold premises. The report was grounded on the non-production of the lessor's title. The plaintiff excepted to the report. The Chief Baron overruled the exception. His Lordship observed that the question was, whether, when a man sells a leasehold estate, he could compel the purchaser to take it without showing him his title. White *v.* Foljambe was the first case on this point. There was no case that went the length of showing that a lessor is not bound to show his title. This was a lease from a corporation; and the general rule is, that where a vendor offers any thing for sale, the vendee is entitled to have the thing he buys with a moral certainty that he has the thing he buys. If a man sell an inheritance, he must show a title to the inheritance: so if a life estate. Then what is the difference where a lease is sold? It is said, however, that this is an anomalous case, but the law

(*m*) 28 July 1821, MS.

has not said so, nor has it been so considered in any of the decided cases. Then it is objected, that a lessor has not the means of compelling the inspection of his lessor's title; that is true, but furnishes no ground for an exception. A lessee may insist on looking into his lessor's title, or that he should produce it; but if he omits to do so, is that any reason why the vendee of a lease should be deprived of those advantages? Another course is, to state in the advertisement that you cannot show the title. Therefore, though after the lease is granted the lessee cannot compel the production of his lessor's title, there is no reason why the vendee should be put to any risk. Then is there a good title here; the lease is made in 1774, does the length of time make the lease good? Suppose it had been made by a tenant for life; a tenant for life might live for forty-five years, forty-five years possession would not be good evidence of a title to the inheritance; but then it is said, this was a lease by a corporation. His Lordship was of opinion, that there might be circumstances which might make an alteration; but here there was no act of ownership prior to 1774, no prior leases. A tenant for life might have conveyed in fee to a corporation, but on the death of the tenant for life, the estate would cease. This case, therefore, did not differ from the case of a lease from an individual.

If a purchaser of a leasehold estate had notice, at the time he entered into the contract for purchase, of the vendor's inability to produce the lessor's title, he would not afterwards be allowed to insist on its production. Wherever, therefore, a vendor of a leasehold estate has not an abstract of the lessor's title, this circumstance should be mentioned in the particulars of sale, if sold by auction; or in the agreement, if sold by private contract.

But

But a purchaser of an estate held under a bishop's lease, annot call for the lessor's title (*n*).

It seems formerly to have been thought, that a plaintiff n an ejectment for a leasehold estate, could not recover nless the original lease and all the mesne assignments ere proved; but this rule has been relaxed, and where the ossession had been uniform, the jury will be recommended presume any old assignments which have been lost (*o*). cannot, however, be laid down as a general rule, that a urchaser of a leasehold estate can safely accept the title here any of the mesne assignments have been lost, although e might be able to recover in ejectment if he actually did urchase. Every case of this nature must depend upon s own particular circumstances (*p*).

With respect to the title to renewable leaseholds, great ifficulty constantly occurs. All public bodies who grant enewable leases, require the old lease to be given up before hey will grant a new one; and when they once obtain ossession of a surrendered lease, they will not part with , or permit a copy of it to be taken. When the lessee sells, e produces an abstract of the subsisting lease and subsequent instruments. Now this is a title which it is impossible to accept, however willing the purchaser may be, and lthough he may have waved calling for the lessor's title. Every lease is stated to be granted in consideration of the urrender of the former lease, and by means of this reference the chain of title is kept up. The reference in the last lease to the one immediately preceding, is notice of it to the purchaser, and that again is notice of the one before that, and so on to the first lease. And if in any of these leases the lessee is described as devisee under a will, or there is any thing to lead the mind to a conclusion that the

(*n*) Fane v. Spencer, 2 Mer. 430. 1228. See 11 Ves. jun. 350.

(*o*) Earl v. Baxter, 2 Blackst. (*p*) *Vide post*, Hilary v. Waller.

lessee

lessee is not absolutely entitled, the purchaser will be liable to the same equity as the lessee was subject to, although he, the purchaser, had no other knowledge of the fact, than the mention in the lease of the surrender of the former lease, equity deeming that sufficient to lead him to inquire into the title (*q*). Harsh as this rule may seem, it is quite consistent with the general principles of equity, and is imperiously called for in this case, because public bodies generally renew with the person having the legal estate, and seldom suffer any trusts to appear on the lease, lest they should be implicated in the execution of them.

Although a purchaser buys with full notice that a title cannot be made without the consent of a third person, yet it lies on the seller and not on the purchaser to obtain the consent. It cannot be inferred that the seller only agreed to part with his interest in the estate as far as he was able to do so (*r*).

III. To enable equity to enforce a specific performance against a purchaser, the title to the estate ought, like Cæsar's wife, to be free even from suspicion (*s*); for it would be an extraordinary proceeding for a court of equity to compel a purchaser to take an estate which it cannot warrant to him (*t*). It hath, therefore, become a settled and invariable rule, that a purchaser shall not be compelled to accept a doubtful title (*u*); neither will he be forced

(*q*) Coppin *v.* Fernyhough, 2 Bro. C. C. 291.

(*r*) Lloyd *v.* Crispe, 5 Taunt. 249; Mason *v.* Corder, 2 Marsh. 332; 7 Taunt. 9.

(*s*) See 2 Ves. 59.

(*t*) Heath *v.* Heath, 1 Bro. C. C. 147.

(*u*) Marlow *v.* Smith, 2 P. Wms. 198; Mitchel *v.* Neale, 2 Ves. 679; Shapland *v.* Smith, 1 Bro. C. C. 74; Cooper *v.* Denne, 4 Bro. C. C. 80; 1 Ves. jun. 565, S. C.; Crewe *v.* Dicken, 4 Ves. jun. 97; Rose *v.* Calland, 5 Ves. jun. 186; Roake *v.* Kidd, *ibid.* 647; Wheate *v.* Hall, 17 Ves. jun. 80; Sloper *v.* Fish, Rolls, 29 July 1813; 2 Ves. and Bea. 145; Jervoise *v.* Duke of Northumberland, 1 Jac. and Walk. 559.

take an equitable title (*x*); nor will a case be directed the judges as to the title, unless the purchaser be ing that it should (*y*); and even if a case should directed, and the judges were to certify in favour of title, yet a specific performance would not be decreed ess the Court itself were satisfied of the equitable as well the legal title of the vendor (*z*). And although the ges certify in favour of the title, and there is no equitable ection to it, yet if the point of law is very doubtful, the chaser may require another case to be directed, which seems will not be sent back to the same court (*a*).

The doubt generally turns upon a point of law, but the e equally applies to other cases. Therefore where a tator, who appeared to be seised of the entirety of an ate, devised his undivided moiety, or half part of it, and other his shares, proportions and interests if any there- and no evidence appeared that he had not the entirety, l the words were sufficient, if he had, to pass it; Lord ham was of opinion that the title was good, but he was e of opinion that this was not a reasonably clear market- e title, without that doubt as to the evidence of it, which st always create difficulty in parting with it, and there- e he refused to force the title on a purchaser (*b*).

So there are many cases in which a jury will collect the t of legitimacy from circumstances, in which it might attended with so much reasonable doubt, that equity uld not compel a purchaser to take it merely because re was such a verdict. The Court ought to weigh,

(*x*) Cooper *v.* Denne, *ubi sup.*; see 2 Ves. jun. 100; and *infra*.

(*y*) Roake *v.* Kidd, *ubi sup.*

(*z*) Sheffield *v.* Lord Mulgrave, 1 Ves. jun. 526.

(*a*) Trent *v.* Hanning, 10 Ves. jun. 500.

(*b*) Stapylton *v.* Scott, 16 Ves. jun. 272. See 1 Ves. and Beam. 403; and see and consider Hartley *v.* Smith, 1 Buck, 368.

whether

whether the doubt is so reasonable and fair, that the property is left in his hands not marketable (*c*).

And where an action is brought against a purchaser for non-performance of an agreement, a court of law will look as anxiously to see that the title is clear of doubt as a court of equity would. Therefore in a case before Lord Kenyon at *nisi prius* (*d*), where an objection was made to the title, his Lordship said he would not then determine the point, nor was it necessary to do so. He thought it a question of some nicety; but whether it was or not, he thought it equally a defence to the action. When a man buys a commodity, he expects to have a clear indisputable title, and not such a one as may be questionable, at least, in a court of law (I). No man is obliged to buy a law-suit; and a verdict was given for the purchaser.

In a late case (*e*), where at law the same argument was urged on behalf of a purchaser who was plaintiff, Lord C. J. Gibbs said, it was intimated that if any doubt could be cast on the title of the vendor, the plaintiff would be entitled to recover back his deposit. Now, if he had gone into a court of equity, the Chancellor would not, perhaps, have obliged an unwilling purchaser to ratify the contract. But if he come into a court of law to recover the deposit, on the ground of an insufficient title, he must abide by the decision of that court, and that is the difficulty which the party had brought upon himself by coming into a court of law.

(*c*) *Per* Lord Eldon. See 8 Ves. jun. 428.

(*d*) Hartley *v.* Peahall, Peake's C. 131; Wilde *v.* Fort, 4 Taunt. 334; *sed qu.* whether at law the judge is not bound to decide the point?

(*e*) Romilly *v.* James, 1 Marsh. 600.

(I) This expression seems to refer to the question, whether equitable objections to a title are a defence at law. *Vide supra*, p. 218.

In

In a late case, where the estate was sold without any notice, that it was recently allotted under an inclosure act, and it appeared *that the commissioners had not made their award*, and the act contained no clause authorizing a sale before the award; Lord Ellenborough held, that the purchaser was warranted in refusing the title (*f*). But if the purchaser is at the time of the contract aware that the estate is in a progressive state of inclosure, and there is no ground to suppose that the commissioners will vary the allotments, assuming their power to do so, the purchaser will be compelled to take the title although the award is not executed (*g*).

Where an act of bankruptcy has been committed, the purchaser cannot be compelled to take the title, although the vendor swear that he owes no debt upon which a commission can issue, and the purchaser cannot disprove the statement. The ground of this determination was, the impossibility of ascertaining that there was not such a debt as would support a commission (*h*). And upon the same principle, a purchaser who has become bankrupt cannot compel a conveyance of the estate to him; because he cannot satisfy the vendor that he will be entitled to retain the purchase money (*i*).

So, where an estate is sold subject to a rent, which, although not so stated, appears to be only a part of a larger rent charged on that and other property, the purchaser will not be bound to take the title, although for many years the apportioned rent has been received:—an

(*f*) Lowndes *v.* Bray, Sitt. after T. Term, 1810; Cane *v.* Baldwin, 1 Stark. 65; Farrer *v.* Billing, 2 Barn. and Ald. 171.

(*g*) Kingsley *v.* Young, MS.; S. C. 17 Ves. jun. 463, affirmed on an appeal, by Lord Eldon. The act authorized a sale before the award.

(*h*) Lowe *v.* Lush, 14 Ves. jun. 547.

(*i*) Franklin *v.* Lord Brownlow, 14 Ves. jun. 550.

apportionment

apportionment by deed must be shown. It is the duty of the vendor to give the purchaser a complete formal discharge of all the further rent that the house was ever liable to. Although an apportionment may be presumed, yet as Mr. Justice Chambre observed, the question here is not what may be presumed, but whether a purchaser is compellable to accept a purchase, where his title rests only on presumption, which may be rebutted by other evidence. And Lord Chief Justice Mansfield said, that a court of equity would not decree a specific performance in a case like this, unless the seller could procure the ground-landlord to apportion the rent, by joining in an assignment of the lease; in which assignment the apportioned rent should appear (*j*).

But where an apportioned rent is sold, if the rent is an apportioned rent, the purchaser cannot object that he will not have the same remedies as if the rent were entire (*k*).

So where an estate, held under one lease, is sold in lots, and the fact is stated, and it is stipulated that the purchaser of one particular lot is to be subject to the whole of the rent, the other purchasers cannot object to the title although there is a clause of re-entry on non-payment of the rent contained in the lease (*l*).

In a case where an estate was sold in lots, and one of the conditions stated that the estate was subject to the perpetual payment of 12*0l.* to the curate of *A*, but the same and a perpetual annual payment to the hospital of *B* were in future *to be charged upon* and paid by the purchaser of lot 1. only; it was held, that the purchasers of the other lots were only entitled to such an indemnity

(*j*) Barnwell v. Harris, 1 Taunt. 430.

(*k*) So held by the V. C. in Bliss v. Collins, reported in 4 Madd. 229. See S. C. 1 Jac. and Walk. 426; Walter v. Maunde, 1 Jac. and Walk. 181.

(*l*) Walter v. Maunde, *ubi sup.*

as could be made by the purchaser of lot 1. to the purchasers of the other lots (*m*).

So where the estate agreed to be leased was comprised with others in an original lease, under which the lessor had a right to re-enter for breach of covenants, so that the under lessee might be evicted without any breach on his part, it was held, by the present Vice-Chancellor, that he was not bound to accept the title with an indemnity. His Honor observed, that where a party comes for a specific performance, he desires the Court to give the party the specific subject. Now here he could not secure the possession of the subject upon the terms agreed upon. But he offers an *indemnity*. The lessee might be evicted, and therefore it was compensation and not indemnity that was offered. I will give you the subject of the contract not with a sure title, but with a compensation in case of eviction. It was not a case for an indemnity, and the Court could not compel a performance with a compensation (*n*).

In a late case (*o*), upon a purchase, it was agreed, that if there should be found any fee farm-rents, or quit-rents, chargeable on the same, an allowance should be made at the rate of thirty years purchase on the amount thereof. It appeared that the estate, with others of great value, was charged with a perpetual rent of forty marks, originally reserved to the Crown; but a similar rent was granted to trustees in fee, in the usual way, out of a part of the estate sold, of nearly ten times the annual value of the rent, with indemnity to the other estates against the rent. It was stated, that this charge prevented the seller from making a good title. It was argued, on the part of the seller, that

(*m*) Cassamajor *v.* Strode, 1 Wils. Ch. Ca. 428.

Childes *v.* Hooker, 3d April 1818, V. C. S.; 3 Madd. 193.

(*o*) Hays *v.* Bailey, Rolls, 10 Aug. 1813, MS. *vide infra*. See Cassamajor *v.* Strode, 1 Wils. Cha. Ca. 428.

this

this was the precise case in which a purchaser would be compelled to take the title with an indemnity. Equity looks only to the substantial execution of the contract, and here the rent was not, *in substance*, a charge on the land. It was not like the case of a lease, where non-payment of the rent, or non-performance of the covenants, might avoid the estate of the person who was required to accept the indemnity; but this was the simple case of a money payment, which would, of course, be accepted from the owner of the estate exclusively charged with it, by way of indemnity; and which estate would always be liable to answer any payment made on account of the rent by the persons intended to be indemnified against it. The objection, if allowed, would affect half the titles in the kingdom. It applies to nearly all the estates which came into the hands of the Crown on the dissolution of the monasteries. Dickenson *v.* Dickenson (*p*) was a stronger case; for there the purchaser was compelled to take the title, although the Judge was of opinion, that if, in the event, the fund should turn out deficient for payment of the infant's legacies, they must still have recourse to the estate for the deficiency. The ground of the decision must have been, that there was no chance of the fund proving deficient. Halsey *v.* Grant (*q*), is a direct authority in favour of the seller; and there the indemnity fund was not so large with reference to the amount of the charge as the present; and although Horniblow *v.* Shirley (*r*), was a case of compensation, and not of indemnity, yet it appears that Lord Alvanley said, that if such an objection was to prevail, a purchaser of a portion of a large estate would always be at liberty to get rid of a contract (*s*). In the present case the purchaser did not object to the estate being charged

(*p*) 3 Bro. C. C. 19.
(*q*) 13 Ves. jun. 73.
(*r*) 13 Ves. jun. 8.
(*s*) 13 Ves. jun. 75.

wi

a fee-farm rent, provided he was paid its value. the rent is charged only in point of form; and there- he can require no allowance. On the part of the aser it was argued, that the clause relied upon, on ther side, was evidence that the purchaser was not e the estate subject to any rent, unless it could be to him; and the estate would always be liable to the rm rent, notwithstanding the indemnity. The Master Rolls was of opinion, that the clause in the agreement ed to a rent charging the estate sold only, and not to t charging it and other estates; and that the Master atisfied in considering the rent as an objection to the As to the question of indemnity, his Honor observed, Halsey and Grant was certainly a case of indemnity; Hornblow and Shirley a case of compensation; but ubted whether the deed executed in order to relieve state in question, could be considered such an indem- as a purchaser ought to be compelled to accept, nor ld he decide whether in this case any indemnity could ght to be given by the vendor against such fee-farm He should leave that to be decided when the cause on to be heard thereafter.

pon an appeal to the Lord Chancellor he affirmed the ion of Sir William Grant, on the ground that the rent estion did not fall within the condition; and his Lord- treated the early cases as not authorities, and held a seller was bound accurately to describe what he selling (*t*).

the case of Fildes *v.* Hooker (*u*), the present Vice- ncellor observed, that the utmost length of indemnity that if a good title can be made subject to an incum- ce, the purchaser shall take the title, with a security

M. T. 1821, MS.

(*u*) 3d April 1818, MS.; 3 Madd. 193.

otecting him against the incumbrance. He did n
now that the Court had gone so far, and he should n
e disposed to follow such a rule, because the purchas
is entitled to an estate free from incumbrance. It would
be difficult to convince him that such a rule was right.

It hath been before observed, that a purchaser will not be compelled to take an equitable title; but this rule does not extend to estates sold before a Master under the decree of a court of equity. For in this case, although the legal estate is outstanding, and cannot be immediately got in, yet if the person seised of the legal estate is a party to the suit, the Court will compel the purchaser to accept the title, and will decree generally that the legal tenant shall convey, and that the purchaser shall in the mean time hold and enjoy.

And even where the legal estate is vested in an infant, the Court will compel the purchaser to complete his contract on the usual decree, that the infant shall convey when he comes of age, *unless he then shows cause to the contrary*; and that the purchaser shall in the mean time hold and enjoy.

Thus in a case (*v*) where, upon sale of an estate before a Master, in pursuance of a decree under Lord Waltham's will, the purchaser objected to the title, on the ground of the legal estate being in an infant; Lord Rosslyn, without the least hesitation, compelled the purchaser to take the title, making his decree for the infant to convey in the usual form; because, as the purchaser bought under the decree he was bound to accept such a title as the Court could make him (*w*). And I learn that in a case of this nature, Lor

(*v*) Ch. MS. See Chandler v. Beard, 1 Dick. 392.

(*w*) But note, a purchaser under a decree will not be compelled to take a *doubtful* title. See Mar v. Smith, 2 P. Wms. 198; Sha Wright, 3 Ves. jun. 22; Nc Weston, Coop. 138.

Ro

Rosslyn would not sanction an application by the purchaser, at his own expense, for an act of parliament to divest the infant of the legal estate. Nor, if the estate be copyhold, will the Court retain any part of the purchase money in order to defray the expense of the fine that would be payable, in case the infant heir should die before he surrendered (*x*).

But although a purchaser *under a decree* will be compelled to accept a title of this nature, yet, if he sell the estate, the Court will not enforce a specific performance against the second purchaser.

This was also decided by Lord Rosslyn. The purchaser of Lord Waltham's estate sold the estate to a person who objected to the title upon the same ground as he had objected to it, and refused to complete the contract. The first purchaser very confidently filed a bill for a specific performance, but Lord Rosslyn dismissed it; because such second purchaser *did not buy under the decree*, and therefore was not compellable to accept an equitable title.

In a case where a seller after the contract died intestate, leaving an infant heir, who filed a bill against the purchaser, praying that he might elect either to complete or abandon the contract; and the purchaser submitted to perform the contract, and paid the purchase money into Court, the Master of the Rolls refused to pay it out without the consent of the purchaser during the infancy of the heir (*y*).

In another case, where after a contract for sale the seller died intestate, leaving an infant heir, and his widow, who took out administration as his administratrix, filed a bill for a specific performance against the purchaser and the heir, it was decreed, that day given to the heir to show cause (*z*). But the

(*x*) Morris *v.* Clarkson, 1 Jac. and Walk. 603.

(*y*) Cockell *v.* Bullock, 1 Jac. 604, n.

(*z*) Holland *v.* Hill, Rolls, 18 Mar. 1818, MS.

 objection,

objection, that the purchaser was not bound to accept the title in consequence of the infancy of the heir was not taken.

The reason why a purchaser under a decree is compelled to take an equitable title seems to be this, that the Court has bound the right of the party in whom the legal estate is vested, and will not permit him to take advantage of it. This, however, is not the case where the legal estate is in an infant; as it makes part of the decree, that he shall convey when he comes of age, *unless he then shows cause to the contrary.*

In favour of the rule, by which a purchaser under a decree is compellable to take an equitable title, it may be said, that it facilitates sales under the decrees of the Court; but the injustice of it is too glaring. The decree of a court of equity acts *in personam*, and not like a judgment at law, *in rem*; and it is possible that the Court may never be able to compel the person seised of the legal estate to convey it to the purchaser.

Although an estate is not sold under a decree, and the legal estate appears to be outstanding, and cannot be got in, yet, if the circumstances of the case are such as would induce a court of law, under those grounds upon which presumptions are in general raised, to presume a reconveyance, the purchaser will be compelled to take the title (*a*). Reconveyances have been frequently presumed upon trials at law in favour of justice; but this doctrine was never applied to a contract between a vendor and purchaser, until the late case of Hillary *v.* Waller; which certainly has not met with the approbation of the bar.

(*a*) Hillary *v.* Waller, 12 Ves. jun. 239; Emery *v.* Growcock, *ex parte* Holman, *post*, ch. 9, s. 2, div. iv; but see Keene *v.* Deardon, 8 East, 248; Doe *v.* Brightwen, 10 East, 583, which show that the circumstance of the equitable estate being in the person who claims the benefit of the presumption, is not sufficient of itself to raise it; and see Barnwell *v.* Harris, 1 Taunt. 430; Doe *v.* Calvert, 5 Taunt. 170.

The

The decision has occasioned considerable difficulties in practice. As no man can say where exactly the line is to be drawn, at what period the presumption is to arise, and what circumstances are sufficient to rebut it, each party puts his own construction on almost every case which arises. This, of course, leads to endless discussion and expense, and the very parties in whose favour the doctrine was introduced, ultimately feel how much it would have been to their interest, that the general rule of the profession had not been relaxed. This rule was, that a vendor was bound to get in all outstanding legal estates, which were not barred by the statutes of limitations. The certainty of the rule amply compensated for any individual hardship which it might sometimes occassion.

We have seen, that a purchaser cannot be compelled to take a *doubtful* title; but, nevertheless, he will not be permitted to object to a title on account of a bare possibility; because a court of equity, in carrying agreements into execution, governs itself by a moral certainty: it being impossible, in the nature of things, there should be a mathematical certainty of a good title.

Therefore *suggestions* of old entails, or doubts what issue persons have left, whether more or fewer, are never allowed to be objections of such force as to overturn a title to an estate (*b*).

So where (*c*), upon a purchase, it appeared that the estate had been originally granted by the Crown, in which grant there was a reservation of tin, lead, and all royal

(*b*) See 2 Atk. 20, *per* Lord Hardwicke; and see Lord Braybroke *v.* Inskip, 8 Ves. jun. 417; Dyke *v.* Sylvester, 12 Ves. jun. 126.

(*c*) Lyddal *v.* Weston, 2 Atk 19. See Seamen *v.* Vawdrey, 16 Ves. jun. 390.

mines

mines, without a right of entry; yet, as there had been no search made for royal mines for one hundred and eleven years, and, upon examination, the probability was great there were no such mines, and the Crown, for want of a right of entry, could not grant a license to any person to enter and work them, Lord Hardwick decreed a specific performance.

Again, in a recent case (*d*), where a man articled for the purchase of an estate, with some valuable mines, and would not complete his contract because the mines were under a common, wherein others had a right of common, and consequently he would be subject to actions for sinking shafts to work the mines; Lord Eldon, after showing the improbability of any obstruction from the commoners, said, that in case such an action were brought, he should think a farthing quite damages enough; and therefore decreed a performance *in specie*.

This case, like the last, must be considered to have turned on the improbability of the purchaser being disturbed; otherwise it seems to have gone to the utmost verge of the law; for although such trifling damages could only be recovered, yet that would not be ground for a nonsuit, as was decided in the late case of Pindar *v.* Wadsworth (*e*). The estate, therefore, would subject the purchaser to litigation, whenever malice or caprice might induce any of the commoners to commence actions against him.

So a *mere suspicion* of fraud, which cannot be made out, will not enable a purchaser to reject the title. This was decided by Lord Eldon in a case where, under an exclusive power of appointment, a father appointed to one son in fee; and then the father and his wife and the son joined in conveying to a purchaser, and the money

(*d*) Anon. Chan. 7th Sept. 1803, MS.

(*e*) 2 East, 154.

was

was expressed to be paid to them all. The title was objected to on the ground of an opinion, by which it appeared, that the father first sold the estate, and then the appointment was devised to make a title, and the purchase deed recited that the contract was made with the father and son. And it was insisted, that if the father derived any benefit from the agreement, or even made a previous stipulation, that his son should join him in a sale, which there appeared the strongest reason to apprehend, it would have been a fraudulent execution. But Lord Eldon overruled the objection, as it did not appear that the estate sold for less than its value, or that the son got less than the value of his reversionary interest, but merely that he, as the owner of the reversion, acceded to the purchase (*f*).

But if any person has a claim upon the estate which he *may* enforce, a purchaser cannot be compelled to take the estate, however improbable it may be that the right will be exercised. Thus, in the case of Drewe *v.* Corp (*g*), the vendor was entitled to an absolute term of four thousand years in the estate, and also to a mortgage of the reversion in fee, which was forfeited but not foreclosed. It was decided, that the purchaser who had contracted for a fee, was not bound to take the term of years. Nor was he compelled to take the title on the ground of the vendor having a forfeited mortgage in fee of the reversion, although it was evidently highly improbable that any one would ever willingly redeem a forfeited mortgage of a dry reversion expectant upon an absolute term of four thousand years.

So in a late case (*h*), where in 1704 the estate was sold with a reservation of salt-works, &c. with a right of entry,

(*f*) M'Queen *v.* Farquhar, 11 Ves. jun. 467. See *post*, ch. 17; and see Barnwell *v.* Harris, 1 Taunt. 430.

(*g*) *Vide supra*, p. 262.

(*h*) Seaman *v.* Vawdrey, 16 Ves. jun. 390.

 and

and the estate was sold in 1761, and no notice taken of the reservation, and the right had never been exercised: the Master of the Rolls was of opinion that non-user did not in this case raise the inference, that the right was abandoned, and consequently the purchaser was entitled to take the objection, and his Honor distinguished this from the case of Lyddal *v.* Weston (*i*); first, because it was not alleged that there was no probability of mines, it was rather admitted that there were: secondly, here was the reservation of a right of entry upon the want of which Lord Hardwicke laid stress in that case. In the case before his Honor, the purchaser chose to consider this not as an objection to the title, but as a ground for compensation, and it was decreed accordingly.

In a case where a close called the Croyle had always been known by that name, and had been possessed by the seller and his ancestors as part of the estate sold, but no mention was made of it in the deeds by name, and all the other lands were particularly described; the Court considered the evidence of title to be merely that of long possession, and held that the purchaser was not bound to accept the title (*j*).

Where an abstract begins with a recovery to bar an entail, it is usual in practice to call for the deed creating the entail, in order to see that the estate tail and remainders over, if any, were effectually barred (I). But if the deed

(*i*) *Supra*, p. 309.

(*j*) Eyton v. Dicken, 4 Price, 303.

(I) This makes it advisable in deeds to make a tenant to the *præcipe*, or to lead the uses of fines, to recite so much of the instrument under which the tenant in tail claims, as will manifest his power of barring the estate tail and remainders over.

is

is lost, and possession has gone with the estates created by the recovery, for a considerable length of time, and the presumption is in favour of the recovery having been duly suffered, the purchaser will be compelled to take the title, although the contents of the deed creating the entail do not actually appear (*k*).

Where a vendor is tenant in tail, with reversion to himself in fee, and the reversion has vested in different persons, a common recovery is generally required by a purchaser; because that *bars* the remainder, while a fine lets it into possession, and thereby subjects the whole fee to any incumbrance which before affected the reversion only. But unless some incumbrance appear, or the title to the reversion is not clearly deduced, the Court will not compel a vendor to suffer a recovery, on account of the mere probability of the reversion having been incumbered.

Thus in a late case (*l*), upon an exception to the Master's report in favour of the title, the objection to the title was, that one Elizabeth Baker ought to join in a recovery; the title being derived from John Pain, who, 1693, limited the estate to the use of himself for life; remainder, subject to a term, to uses which never arose; remainder, to his daughters in tail; remainder to himself in fee. Under these limitations Elizabeth, an only daughter, became seised in tail, with the immediate reversion to her father, who made a will, not executed so as to pass real estate, whereby he devised all his estate to his second wife. Upon his death Elizabeth his daughter entered, and levied a fine. She had issue a daughter, Elizabeth, who married William Baker. They had issue one daughter, Elizabeth Baker.

(*k*) Coussmaker v. Sewell, Ch. 4th May 1791, MS.; Appendix, No. 13.

(*l*) Sperling v. Trevor, 7 Ves. jun. 497.

From

From her the estate was purchased under a decree, and by mesne purchases became vested in the plaintiff. The defendant, the purchaser, suggested, that the ultimate remainder in fee might have been by deed or will disposed of by John Paine, or by any other person to whom it might have descended; and if the same should have been so disposed of, it could then be barred only by Elizabeth Baker. The Lord Chancellor held a recovery not necessary.

It will occur to the learned reader, that, notwithstanding the defendant's suggestion, it was highly improbable that the reversion was disposed of by John Paine in his life-time, such an interest not being marketable; and as he devised all his estate by his will, there was no ground to presume that he made another will. Upon his death, therefore, the reversion descended to his daughter, who by her fine reduced it into possession, and consequently no incumbrance could afterwards be created upon it, as a reversion distinct from the particular estate.

At this day it frequently happens, that in deeds securing debts on real estate, the estate is authorized to be sold without the assent of the owner, in case default is made in payment of the money on the day named. Such a security is so far a mortgage, that the owner may at any time before a sale require a reconveyance upon paying the money due; and in consequence of the old rule, that once a mortgage always a mortgage, the owner is in these cases usually required to join in the conveyance, which he is mostly unwilling to do; his object being to prevent a sale. But it has been decided by Lord Eldon, that the objection cannot be sustained, and this decision was made in a case where the deed was in form a regular mortgage with a power of sale, and the mortgagor in his answer stated that he actually resisted the sale as having been made without his

consent

consent and at an undervalue (*m*). This has been followed in many later cases, and is now an established rule (*n*).

It is clear that a woman is barred of her dower both at law and in equity, by a legal term created previously to her right of dower attaching on the estate, of which an assignment has been obtained by a purchaser to attend the inheritance (*o*). For although she can recover her dower at law, it will be with a *cesset executio* during the term, and equity will not remove the bar. But notwithstanding that a purchaser can obtain an assignment of an outstanding term, which will bar the vendor's wife of her dower, a fine is always required from the vendor and his wife at his expense.

Upon the authority of the anonymous case before Lord Eldon, before cited (*p*), it perhaps might be doubted, whether a court of equity would not enforce a purchaser to accept the title without a fine. It must at the same time be observed, that in that case the vendor could not make the title perfect; whereas in the case under consideration a vendor can remove every difficulty at a trifling expense which circumstance would certainly have great weight with a court of equity. In a late case, however, Lord Eldon put the very point. He said, that if a husband entered into a contract to sell an estate, not contracting for more than to make a good title; no specialty about dower; but the Master's report was in favour of the title, on the

(*m*) Clay *v.* Sharpe and others, Ch. Mich. Term, 1802, Lib. Reg. A. 1802, fo. 66, Appendix, No. 14.

(*n*) Baker *v.* Dibbin, Dibbin *v.* Baker, Exch. April 20, 1812, MS.; Corder *v.* Morgan, 18 Ves. 344; *Note*, Stubbank *v.* Leatt, Coop. 46, which was taken from a hasty not on a brief, is not, when attentively considered, an authority the other way.

(*o*) *Vide infra*, ch. 9.

(*p*) *Supra*, p. 310.

ground

ground that a term was outstanding which might be assigned; *the Court would make the purchaser take the title as the trustees might convey* (*q*). This was only an *obiter dictum*, and with all the respect due to the judge from whom it fell, is open to much observation. In the first place it assumes what has never been decided, that equity would *compel* trustees of a term with notice of the wife's right, to assign the term to a purchaser, so as to exclude the title of dower. The Court would probably feel great reluctance in making such a decision. It is one thing to say, that when a purchaser has obtained an assignment of a term, he may avail himself of it as a protection against the wife's dower, "because such was the general practice and opinion of conveyancers (*r*);" and another, for equity to say that, as a discreet exercise of its jurisdiction, it will compel trustees to assign the term to a purchaser, in order to exclude the widow. In Maundrell *v.* Maundrell, the Master of the Rolls forcibly observed, that a purchaser, merely as such, has no equity whatsoever against the widow, claiming by title prior to, and both legally and equitably as good as his. The term, if it continued outstanding, is as much attendant in equity upon dower, as the remaining interest in the inheritance; and therefore ought not to be set up by the latter against the former (*s*). But admitting that equity would compel trustees to assign the term, yet two weighty reasons present themselves why a purchaser should not be compelled to rely on the term. The one, that he would be at the expense of keeping the term on foot; the other, that if a writ of dower should be brought against him, and the term were even to protect him against the widow's claim, yet he must pay the costs of the action, &c. These are the reasons why a fine is in practice insisted upon. The very point now stands for

(*q*) See 10 Ves. jun. 261, 262.
(*r*) *Vide infra*, ch. 9.
(*s*) See 7 Ves. jun. 579.

judgment

judgment before the Lord Chancellor in Mole *v.* Smith (*t*), where the attendant term had by the death of the trustee, and the grant of administration to his personal estate, become vested in the dowress herself. The case involves two points, 1. Whether the widow is entitled to dower, notwithstanding the existence of the term; 2. If not, whether the purchaser can be compelled to rely upon the term.

The wife of a trustee in fee, or of a mortgagee in fee of a forfeited mortgage, is at law entitled to dower; but a fine is on that account never required by a purchaser; because, if the wife of a trustee or a mortgagee were to be so ill advised as to prosecute her legal claim, equity would, at this day, undoubtedly saddle her with all the costs (*u*).

But where the wife of a vendor has only an *equitable* jointure, some gentlemen require a fine; this practice is, however, discountenanced by the majority of the profession; and if a woman equitably barred of her dower, should bring a writ of dower, it seems clear that equity would protect the purchaser, and condemn the widow in costs.

But it is objected by the advocates for a fine, that if the fund upon which the equitable jointure is charged, should be evicted from the jointress, she could then claim her dower out of any real estate of which she would otherwise have been dowable. And this objection seems equally to apply to a legal jointure. For it is by the statute of uses (*w*), by which jointures are made bars to dower, declared, that if any woman be lawfully evicted from her jointure, or any part thereof, without any fraud or covin, then she shall be endowed of as much of the residue of her husband's tenements or hereditaments whereof she was before dowable, as the same lands and tenements so evicted shall amount to.

(*t*) MS. See 1 Jac. and Walk. 865, the report upon the hearing at the Rolls.

(*u*) See Noel *v.* Jevon, Bevant *v.* Pope, 2 Freem. 43, 71.

(*w*) 27 Hen. VIII. c. 10, s. 7. See Gervoyes's case, Mo. 717. pl. 1002; and see 4 Co. 3 b. 4 Bro. C. C. 506, n.

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When the first edition of this work was published, the author was not aware of any case in which this doctrine was expressly established, but he stated, that no reason appeared why a jointress evicted of her jointure should not recover her dower out of lands sold by her husband, of which she would have been dowable at common law; and that if so, although the wife of a vendor had a *legal* jointure, a purchaser ought to insist on a fine, unless he was satisfied that the title to the jointure lands was good. He remarked, however, that this was never attended to in practice, and that he never heard that the objection was taken, which made him apprehensive he had fallen into an error. The point could not, he thought, so long have escaped notice. But he concluded that, whether a jointress, evicted from a legal jointure, could claim her dower out of lands sold by her husband, of which she was dowable at common law, or whether she was entitled to no relief against a purchaser, it seemed clear, that, unless in the case of a legal jointure a purchaser could call for the title to the jointure lands, or require a fine, he could not do so in the case of an equitable jointure, where the wife was adult at the time of the marriage; for there could be no doubt but that equity would act in strict analogy to legal jointures.

Since the publication of the first edition, the author has met with Maunsfield's case, which was adjudged in the 28th of Eliz. (*x*). There a jointure was conveyed to the wife before the coverture, and during the coverture the husband purchased other lands, and aliened them again, and died: the land which the wife had in jointure was evicted, and the wife had dower of the lands which were purchased, and aliened by the husband at the time when she was barred of her action of dower. This case expressly

(*x*) Harg. n. 8 to Co. Litt. 33 a, stated from a MS. commentary on Litt. supposed to have been written before the publication of Sir Edward Coke's Commentary. See Simpson *v.* Gutteridge, 1 Madd. 609.

decided

decided the point before discussed, as to a legal jointure; and equity must, in this respect, follow the law.

It is not necessary that a wife should previously to marriage be a party to the deed securing her jointure, but there is no *decision* to prove that a jointure can be made upon a wife before marriage without the privity of herself, or if under age of her guardian, which will bind her (*y*). There have been different opinions upon this question, but if a wife could be barred without her privity, a man might in every case secretly bar his wife of dower by a mere nominal jointure. The statute does not authorize such a fraud; and it would lead to great inconvenience to refer it to a jury to inquire whether a jointure made without the wife's privity was fraudulent or not. The power which the statute reserves to a woman to elect her dower where a jointure is made after marriage, unless by act of parliament, appears to proceed on the ground that she is during the coverture incapable of consenting to the jointure without the aid of parliament; and seems to prove that the legislature could not intend to bind her by a jointure made without her privity, when she was competent to consent. If her consent was not necessary, it would be unimportant whether the jointure was made by her husband before or after marriage. At the common law, a jointure before marriage was not a bar of dower for two reasons, 1. because the woman had no title of dower at the time of the acceptance of the satisfaction: 2. because no collateral satisfaction can bar any right or title of any inheritance or freehold. Coke explains the origin of jointures thus: Before the making of the statute of uses, the greatest part of the land in England was conveyed to uses, and as a wife was not dowable of uses, *her father or friends upon her marriage procured* the husband to take an estate from

(*y*) In Jordan v. Savage, 2 Eq. Ca. Abr. 101, the widow took possession of the lands limited to her for her jointure by the articles; see 2 Eden, 66.

his feoffees, or others seised to his use, to him and to his wife before or after marriage for their lives or in tail, *for a competent provision for the wife* after the husband's death. Then came the statute of uses, by the operation of which, if further provision had not been made, the wives would have as well their dowers as their jointures, and for this reason the branches concerning jointures were added to the statute (*y*). In a passage where Coke says, that if a jointure is made to a woman before marriage the wife cannot wave it, he refers to an authority in which the jointure was made in performance of covenants (*z*). It is evident that Coke considered that her assent was requisite to a jointure made before marriage. Gilbert was of the same opinion. In his Uses (*a*), he says, if a jointure be made before marriage, she is sole, *and as such under no man's power*; if after marriage she take a jointure in satisfaction of a dower, she may wave it after coverture. But whatever may be the law on this point, no jointure is ever made without the wife's privity. No case has occurred since the statute of Hen. VIII. of a jointure made without the wife's privity, and not afterwards accepted by her. Of course, therefore, no distinction ever existed in practice between such cases, and cases where the wife being adult consented to the provision. The provision in each case, that is, whether made with or without her consent, equally proceeds from the husband, and is equally supported by the same consideration; viz. marriage. If the jointure, made with the wife's privity before marriage, does not preclude her from claiming dower out of her husband's other estates, if she be evicted from her jointure, under the provision in the statute, of course the same rule must prevail in equity. Clearly, equity could not, on the ground of implied contract, or of the wife's right to investigate the title to the jointure lands, restrain her from claiming her dower out of her husband's other estates. No such equity has ever been

(*y*) 4 Rep. 1 b, 2 a. (*z*) Ib. 3. (*a*) Page 152.

een administered. It is admitted, that jointures made with he wife's privity are only a bar by force of the statute, ut the bar does not extend to the excepted case of an viction of the dower; and to raise a case of equity against woman claiming the benefit of the exception, it would e necessary to prove an express contract by her re-nquishing such benefit.

The author's present impression therefore is, that where n estate would be subject to the dower of the vendor's ife, if she were not barred by a jointure, whether legal r equitable, the vendor must either procure his wife to evy a fine of the estate at his own expense, or must pro-uce a satisfactory title to the jointure lands. And this s no more than is constantly required where an estate has een taken in exchange. The vendor is compelled to roduce the title not only to the estate sold, but also to he estate given by him in exchange. The same principle pplies to the case under consideration.

Equity appears to consider any provision, however in-dequate or precarious it may be, which an adult, pre-ously to marriage, accepts in lieu of dower, a good itable jointure (*b*): and will in some cases even *imply* ntention to bar the wife of her dower; thus, where a ision was made for the livelihood and maintenance of ife after her husband's death, although it was not ex-ed to be in bar of dower, yet it was holden to be a equity, on the implied intention of the parties (*c*).

rdan v. Savage, Bac. Abr. (B.) 5; Charles v. An-Mod. 152; Williams v. Ves. jun. 545; 4 Bro. C. This was admitted by the r the appellants in Drury See 5 Bro. P. C. 581. rd v. Longdale, 3 Atk. 8, cited; reported 2 Kel. Cha. Ca. 17, nom. Vizod v. Londen. See 2 Com. Dig. 148; Estcourt v. Estcourt, 1 Cox, 20. See Tinny v. Tinny, 3 Atk. 8; Conch v. Statton, 4 Ves. jun. 391; and Garthshore v. Chalie, 10 Ves. jun. 20. See Sugd. n.(7) to Gilb. on Uses, p. 332.

But in a case where a leasehold estate was settled before marriage upon the intended wife "in recompense, and bar of dower, and for a provision for her," and the husband had no real estate, it was held that the wife's right to thirds was not barred (*d*). For, as the declared object was to bar her of dower, no implication could be admitted, that she was to be barred of thirds also; the direction that the settlement was for a provision for her, only expressed the effect of the settlement, and could not be deemed evidence of an intention to bar her of a right which was not named.

So, as infants are within the statute of Henry VIII. (*e*), and may be barred of dower at law, they may in like manner be barred by an equitable jointure (*f*).

But an equitable provision in bar of dower will not bind an infant, unless it be as certain a provision as her dower. Therefore a settlement of an estate upon an infant for life, after the death of her husband *and any third person*, will not be a good bar, as the stranger may survive the wife (*g*). So a provision that the personal estate shall go according to the custom of London, in bar of dower, or any provision of that nature, will not be deemed an equitable bar of dower to an infant, on account of the uncertainty and precariousness of the provision (*h*).

Supposing an equitable jointure to be merely charged on stock vested in trustees, *and the wife to have been married under age*, there seems reason to contend, that *if the fund should be wasted by the trustees*, equity would not restrain

(*d*) Creswell *v.* Byron, 3 Bro. C. C. 362. See Pickering *v.* Lord Stamford, 3 Ves. jun. 332.

(*e*) Drury *v.* Drury, or, Earl of Bucks *v.* Drury, 5 Bro. P. C. 570; 4 Bro. C. C. 506, n.; Wilmot, 177.

(*f*) See the cases, *ante*, n. (*l*).

(*g*) Caruthers *v.* Caruthers, 4 Bro. C. C. 500.

(*h*) Smith *v.* Smith, 5 Ves. jun. 189.

the

the wife from proceeding for her dower; and in that case a purchaser would certainly be entitled to a fine (I).

In Caruthers *v.* Caruthers (*i*), Lord Alvanley, then Master of the Rolls, addressing himself to what was and what was not an equitable bar of dower to an infant, put the case of a charge in bar of dower made upon an estate with a bad title, and held that it would be no bar. Therefore, whatever opinion may be entertained on the general question, a purchaser must be satisfied of the title to the lands upon which the equitable jointure of a *feme covert* married under age is charged. And where the settlement rests in covenant, the purchaser should not complete his contract until the covenant be actually performed; for an alienation by the husband of the fund out of which the jointure is to arise, will be deemed an eviction of the fund, and consequently the wife will be let in for her dower (*j*).

It appears from some manuscript opinions, that Mr. Fearne frequently advised a purchaser to take a fine from a vendor and his wife, although she was legally barred of her dower by settlement. To use his own words in an opinion: "It may not be improper to have a fine from Mr. *H.* and his wife, notwithstanding she is barred of dower by settlement. I frequently advise such a step to preserve the purchaser at any time from the difficulty of proving, or coming at such settlement; but as the fine is not necessary, it must of course be at the purchaser's own expense, if he chooses to have it."

In the case of Pope *v.* Simpson (*k*), Lord Rosslyn appears to have held, that persons purchasing from the assignees of

(*i*) 4 Bro. C. C. 500. See 5 Ves. jun. 192.

(*j*) Drury *v.* Drury, 4 Bro. C. C. 506, n.

(*k*) 5 Ves. jun. 145.

(I) This point does not appear to be decided either by Drury *v.* Drury, or Williams *v.* Chitty.

 a bankrupt,

a bankrupt, have no right to expect more, than that the assignees should deliver over such title as the bankrupt had. This decision, however, was opposed by prior cases (*l*), and the general rules of equity; and in a late case Lord Eldon expressly denied the doctrine advanced by Lord Rosslyn (*m*); and the late Master of the Rolls since actually decided, that assignees stand in the situation of ordinary vendors (*n*).

But in a case (*o*) where assignees, having a defective title, put it up to sale, and one of the conditions stated, that the purchaser should have an assignment of the bankrupt's interest to one moiety of the estate, *under such title as he lately held the same*, an abstract of which might be seen at a place named in the conditions, the Vice-Chancellor stated, that a vendor, if he thinks fit, may stipulate for the sale of an estate with such title only as he happens to have; and he held, that in this case the assignees sold only such title as they had; but as it was stated that the conditions of sale were not circulated before the sale, the purchaser was offered an inquiry as to this fact.

Conditions like that in Freme *v.* Wright should be looked at with great jealousy, as they are often traps for the unwary; and the Court should at least expect the fact to be broadly stated, that the seller only sells such title as he has, without warranting the same.

Formerly, where a vendor claimed under a modern will, by which the heir at law was disinherited, it was usual to require the will to be proved in equity against the heir at

(*l*) Spurrier *v.* Hancock, 4 Ves. jun. 667; and see Orlebar *v.* Fletcher, 1 P. Wms. 737.

(*m*) White *v.* Foljambe, 11 Ves. jun. 337; and see 18 Ves. 512.

(*n*) M'Donald *v.* Hanson, 18 Ves. jun. 277.

(*o*) Freme *v.* Wright, 4 Madd. 364. See Baxter *v.* Conolly, 1 Jac. and Walk. 576.

law

): but this practice is now almost wholly discon-
. In the case of Colton *v.* Wilson (*q*), the purchaser
i the first instance discharged from his purchase on
lt of the will not being proved against the heir at
ut on a rehearing he was compelled to take the title.
ecree, however, was made on the particular circum-
of the case, and the point was by no means settled.
amy *v.* Liversidge (*r*), the title received the Master's
ation, although the will was not proved against the
law; and upon exceptions to his report on that
t coming on, Lord Kenyon, then Master of the
overruled them.

not unusual to require the heir at law to join in the
nce, if his concurrence can be easily obtained; and
he is a party to a conveyance in any other character,
variably made a conveying party, in his character
at law; although, in strictness, this could not be
upon.

should even be thought that a modern will must be
against the heir at law, yet it seems clear that equity
not compel the vendor, at the suit of the purchaser,
e the will *per testes*. The objection, therefore,
any construction, could only be set up by a pur-
as a *defence* to a specific performance.

There is a serious objection frequently taken to titles,
it may not be improper to consider in this place.
objection to which I allude is, that an equitable re-
is void where the *equitable* tenant to the *præcipe* has

e Fearne's Posthuma, 234.
rison *v.* Coppard, 2 Cox,
o the custody of the will.
P. Wms. 190.
an. 1 June 1786, MS.;
and see Wakeman *v.* Duchess of Rutland, 3 Ves. jun. 233; 8 Bro. P. C. 145; *sed vide* Smith *v.* Hibbard, 2 Dick. 730.

the legal estate. In support of this objection, it is urged, that where the legal freehold is limited to one for life, with an equitable remainder to the heirs of his body, the estates cannot coalesce so as to make the parent tenant in tail, notwithstanding that he has the beneficial; and consequently the equitable estate for life; and therefore, upon the same principle, the legal tenant for life cannot be considered as seised of an equitable estate, distinct from his legal estate, so as to support the recovery as a good equitable recovery.

In answer to this argument, it may be said, that the reason why the equitable remainder to the heirs of the body cannot coalesce with the legal estate for life is, that the rule in Shelley's case requires both estates to be legal. This is an imperative rule of law, which courts of equity can no more depart from than they can alter the rules of descent. Equity, however, follows the law; and therefore, if both estates are equitable, they will unite in the same manner as if they were legal estates. But as Mr. Fearne, with his usual ability, observes, when both the estates are *not legal*, the application of a *legal construction*, or operation of a *rule of law*, which must equally affect *both*, seems to be excluded by one of the objects of that construction not being a subject of *legal* cognizance. So when both are *not equitable* estates, their combination seems to be out of the reach of an *equitable construction* to which one of the estates is not adapted (*s*).

Now this difficulty does not occur in the principal case. The equitable estate tail has no existence in contemplation of law, but depends wholly on the rules of equity for its support. And therefore there is no rule of law which says, that the recovery shall be void. Equity, with respect to equitable recoveries, adheres as nearly as may be to the mode of barring entails prescribed by the law. In this

(*s*) Cont. Remainders, p. 78, 5th edit.

instance

instance the analogy is strictly preserved, for the tenant to the *præcipe* has the equitable estate of freehold. And if a court of equity were to hold a recovery bad, on the ground of the equitable tenant to the *præcipe* having the legal estate, it would only make another deed necessary. The tenant for life would convey to a third person in trust for himself, before he made a tenant to the *præcipe*, and by this simple expedient vanquish the objection.

In a manuscript opinion, given by Mr. Fearne, on this point, in which he held the recovery to be good, although the equitable tenant to the *præcipe* had the legal estate, he first adverts to the analogy preserved between legal and equitable recoveries, and then proceeds thus: "The principle applies with no less force, where we suppose the tenant for life to be of the *legal estate*, for his *own benefit*. For then the *equitable interest* is involved in the *legal*; and of consequence all that is required by the said rule of analogy is had in *his concurrence*, viz. the concurrence of the person entitled *to the beneficial interest or pernancy of the profits* of the immediate estate of freehold. If the concurrence of a person entitled to the mere beneficial interest of freehold will answer the rule of analogy to the requisite extent for barring *equitable estates tail and remainders*, can there be a doubt in regard to the competency of the person entitled *not merely* to *that degree of interest*, but to a *comprehending greater estate*, adequate even to the purpose of *barring legal estates and remainders*? The analogy supposes that a recovery by an equitable tenant in tail will bar the equitable estate tail and remainders, and reversion, even where, if the estate tail and remainders had been *legal*, such recovery *would not have barred them* for want of a legal tenant to the *præcipe*; because that analogy in the one case *substitutes* an *equitable tenant* in the place of a *legal one* in the other. Now, can the same rule of analogy

ever deny to a recovery by a tenant in tail of an *equitable estate* the same effect in barring his estate tail and the subsequent equitable remainders and reversion, as it *would have had* if all those estates *had been legal?* Such a doctrine would be outrunning the analogy, and the very ground for its adoption, in disabling those very persons from barring equitable estates tail and remainders, who might have barred them if they had been *legal*, instead of *equitable*. This would scarcely be reconcileable with the well-known maxim of "*æquitas sequitur legem.*"

If the objection cannot be supported upon principle, much less can it be sustained upon authority. On the one hand, it has never been said that such a recovery is void, except in the case of Shapland *v.* Smith (*t*), where Lord Thurlow is made to say, that Christopher had only an equitable estate for life, and the subsequent estate being executed, he had an equitable estate for life, *and a legal remainder in tail*, which could not unite; and of course there could not be a good tenant to the *præcipe*, and the recovery suffered was void; it being necessary, in order to make a good tenant to the *præcipe*, that there should be a legal estate for life, with *a legal reversion in tail*, or an equitable estate for life, with an equitable reversion in tail. Upon the latter *dictum*, Mr. Fearne, in the opinion before referred to, observes, that he could not hesitate in imputing it to the same inaccuracy or misapprehension of the reporter to which other unwarrantable positions in the same case must, as he conceived, be ascribed. That case came before the Court in consequence of his opinion, taken by the intended purchaser, in which he had objected to the title on the ground of Shapland's taking only an *equitable estate* for life, and the limitation to the heirs of his body operating as a *contingent legal remainder* to such heirs; the equitable

(*t*) 1 Bro. C. C. 78.

and

gal estates being incapable of *that union* which was te to vest the *latter at all in him*, or give him an *ail of any kind.* Baron Eyre inclined against the on; but on a rehearing Lord Thurlow admitted it, e insufficiency of the recovery depended, as he ') understood, not on the want of a *good tenant to cipe*, but the want of *an estate tail in Shapland.* e report accordingly in the margin states, that it was *estate tail* in *C. S.* though the report itself makes the ellor speak of it as a *legal remainder in tail in him.* arne concludes by saying, that "therefore he could sort of stress on any vague expressions in *such a* " And indeed it seems clear, that the ground of Thurlow's judgment was, the impossibility of the uniting, the one being equitable, and the other and that his observations on legal and equitable ties are mistated in the report. A slight emenda- ill make the sentence, which refers to this doctrine, . It may be read thus: "It being necessary, in o make a good tenant to the *præcipe*, that there be a legal estate for life, *where there is* [instead of a legal reversion in tail; or an equitable estate for *here there is* [instead of with] an equitable reversion " And this sentence, as corrected, by no means that a legal tenant for life, for his own benefit, has equitable estate for life, sufficient to support an ble recovery.

ien we remove this *dictum* of Lord Thurlow, as it in the report, there is no *authority* in the books in t of the objection. But, on the other hand, we have Alvanley's authority, that where the equitable tenant has also the legal estate for life, that is no objec- the recovery. And this observation was not lightly for his Lordship repeated it in the course of his judgment

judgment (*u*). And indeed the very point appears to have been decided in the 16th year of Charles II. in a case where a man was legal tenant for life by conveyance; and afterwards the reversioner and ancestor covenanted, in consideration of blood, to settle the estate on him in tail; so that in equity he had a trust in tail in the estate. And the Court confirmed a recovery suffered by him although at the time of suffering it he was but tenant for life in law; *and this although it was objected that he ought first to have exhibited his bill, and have had his estate decreed to him in tail according to the articles* (*w*).

But, even admitting this objection, it cannot be extended to a case where the equitable tenant for life, who makes the tenant to the *præcipe*, is legal tenant *in fee*. The estates are perfectly distinct. He is not legal and equitable tenant for life, but tenant in fee of the legal estate, and tenant for life of the equitable interest (*x*).

V. It so often becomes necessary to consider in what cases an uninterrupted possession creates a title, that the introduction of a few general observations on the operation of the statutes of limitations, may not be deemed impertinent (I).

I. The

(*u*) Philips *v.* Brydges, 3 Ves. jun. 126. 128.

(*w*) Goodrick *v.* Brown, 2 Freem. 180; 1 Cha. Ca. 49.

(*x*) Marwood *v.* Turner, 3 P. Wms. 171.

(I) By the 21 Jac. I. c. 16, s. 1, 2. it was enacted that all writs of formedon in descender, formedon in remainder, and formedon in reverter of any manors, lands, tenements or other hereditaments whatsoever, at any time hereafter, to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at

. Then the statutes of limitations operate by way of to the *remedy*, and not, like the statute of fines, as a to the *right* (*y*). Therefore, although a person is ed of one remedy, yet he may pursue any other remedy ch may afterwards accrue to him. Thus, where a te- t in tail discontinued for three lives, and the issue in was barred of his formedon by the 21 Jac. I. (*z*); after- ds by the death of the three tenants for life, a right ntry accrued to the issue, who entered, and his entry held lawful (*a*).

. It has frequently been thought that the rights of in- s, femes coverts, persons in prison, and beyond sea, are ed by the act of 32 Hen. VIII. (*b*); but on examination ill appear, that the savings extended only to persons

(*y*) See Beckford v. Wade, 17 jun. 87.
(*z*) Ch. 16.
(*a*) Hunt v. Bourne, Lutw. 781; 2 Salk. 422; Com. 124; 1 Bro. P. C. 53.
(*b*) Ch. 2.

> time after the said twenty years; and that no person or persons l, at any time hereafter, make any entry into any lands, tenements ereditaments, but within twenty years next after his or their right or which shall hereafter first descend or accrue to the same; and in alt thereof, such person so not entering, and their heirs, shall be rly excluded and disabled from such entry after to be made, any ner law or statute to the contrary notwithstanding. Provided never- less, that if any person or persons, that is or shall be entitled to such t or writs, or that hath or shall have such right or title of entry, be hall be at the time of the said right or title, first descended, accrued, e or fallen, within the age of one-and-twenty years, feme coverts, non mpos mentis, imprisoned or beyond the seas, that then such person and sons, and his and their heir and heirs, shall or may, notwithstanding said twenty years be expired, bring his action, or make his entry, as might have done before this act, so as such person and persons, or or their heir and heirs, shall within ten years next after his and their l age, discoverture, coming of sound mind, enlargement out of prison, coming into this realm, or death, take benefit of, and sue forth the me, and at no time after the said ten years.

who

who laboured under any of those disabilites *at the time the statute was made* (*c*), (I).

3. The saving clause in the act of James (II) only extends to the persons on whom the right *first* descends; and therefore, when the time once begins to run, nothing can stop it (*d*). So that on the death of a person in whose life the time first began to run, his heir must enter within the residue of the ten years, although he laboured under a disability at the death of his ancestor.

In the late case of Cotterell *v.* Dutton (*e*), a tenant in tail died, leaving the issue in tail a feme covert; who died under coverture and left issue two sons both infants, the eldest attained twenty-one and died without issue, leaving his brother under age, who did not sue forth his writ of formedon within ten years after he attained twenty-one, and more than twenty years had elapsed after the right had first descended. It was held that he was barred by the statute. The ground of this decision was, that the time began to run against the eldest son when he attained twenty-one, and no subsequent disability could stop it; therefore he and his heirs had only ten years from his attainment of twenty-one. This case overruled a notion which had been entertained by some, that issue in tail have distinct and successive rights under the statute, and were not to be barred like the heirs of fee-simple

(*c*) See Bro. Reading, p. 60.
(*d*) Doe *v.* Jones, 4 T. Rep. 300;
Cotterell *v.* Dutton, 4 Taunt. 826.
(*e*) 4 Taunt. 826.

(I) In even the last edition of Bacon's Abridgment, it is stated generally, that the act of 32 Hen. VIII. hath the usual saving for infants, femes coverts, persons in prison, and beyond the sea.

(II) *Note*, Dublin, or any other place in Ireland, is a place within the meaning of the saving of the rights of persons beyond the seas. Anon. I Show. 90.

estates.

This, however, was decided otherwise. Mr. Heath said, that there was no such difference be- the issue in tail and other heirs, as was supposed: on in the descender was expressly mentioned in t clause of the statute.

e case of a fine, it was formerly thought, that if a died under a disability, his heir was excepted out statute of fines, by the proviso (*f*); although the y has been determined by a modern case (*g*). In ute of James, the legislature being aware of this xpressly provided for the *death* of the person to the *first* right should descend; and, therefore, a person, to whom the right first descended, dies disability, his heir must enter within ten years after th (*h*).

he case of Doe *v.* Jesson (*i*), the person upon whom ht first descended was presumed to have died in *under a disability*, leaving his heir also under a ity. The disability ceased in 1792, but the eject- as not brought till 1804; more than twenty years apsed since the death of the person last seised, ore than ten years had elapsed after the cesser disability of the plaintiff; and the Court deter- that the ejectment was out of time. Lord Ellen- h held that the person through whom the lessor of intiff claimed, being under a disability at his father's when his title first accrued, and dying under that ity, the proviso in the second clause of the statute, resort is to be had to it to extend the period for an entry beyond the twenty years), required the

ee Cruise on Fines, 258, cases there cited.
illon v. Leman, 2 H. Black.

(*h*) See Jenkins, 4 Cent. pl. 97; Doe *v.* Jesson, 6 East, 80.

(*i*) 6 East, 80.

lessor

lessor of the plaintiff, as heir to her brother, to make her entry within ten years *after his death*. The word *death* in that clause must mean and refer to the *death of the person to whom the right first accrued*, and whose heir the claimant is, and the statute meant that *the heir* of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor, to whom the right first accrued during the period of disability, and who died under such disability, (notwithstanding the twenty years from the first accruing of the title to the ancestor should have before expired). Mr. Justice Lawrence also gave his opinion that the ten years to the heir run from *the death* of the party dying under the disability.

It will appear that it was not necessary for the Court to decide from what period the ten years should run; for more that ten years had elapsed from the time the heir who brought the ejectment attained twenty-one, when her disability ceased. In the late case of Cotterell *v.* Dutton (*k*), where this doctrine was stated, the Court was of opinion that *the heir* has ten years *after the disability ceases*, not from the death of *the ancestor* who died under a disability. "The ten years do not run at all while there is a continuance of disabilities." This certainly appears to be the true construction of the statute, and it is the construction which has invariably been adopted in practice.

It seems that where no account can be given of a person within the exceptions in the act, he will be presumed to be dead at the expiration of seven years from the last account of him (*l*).

The disability of one coparcener will not preserve the title of the other, who must enter within twenty years after

(*k*) 4 Taunt. 826. (*l*) Doe *v.* Jesson, *ubi sup.*

the

title accrues, although during the whole time her co-ner laboured under a disability (*m*).

It is generally conceived, that a possession for sixty s creates a good title against all the world. Thus e Jenkins (*n*) lays it down, without qualification, at a peaceable possession for sixty years makes a right; 21 Jac. I. c. 16, takes away the entry and assise; Hen. VIII. takes away the writ of right and the forme-" So Mr. Justice Blackstone says (*o*), "that the pos-on of lands in fee-simple and uninterruptedly for sixty s, is at present a sufficient title against all the world, cannot be impeached by any dormant claim whatso-." This, however, Mr. Christian remarks, in a note e above passage, is far from being universally true; a uninterrupted possession for sixty years will not be a title, where the claimant or demandant had no t to enter within that time; as where an estate in tail, ife, or for years, continues above sixty years, still the sioner may enter and recover the estate.

erhaps this remark is not sufficiently pointed. Black-e certainly did not mean, that the lawful possession, ng sixty years, of a tenant in tail, for life, or for years, ld operate as a bar to the reversioner's title, but he ded to a clear adverse possession for sixty years. lowever, even in this light, his position admits of ex-tions. It is possible that an estate may be enjoyed ously for hundreds of years, and may at last be re-ved by a remainder-man. For instance, suppose an te to be limited to one in tail, with remainder over to ther in fee, and the tenant in tail to be barred of his ndy by the statutes of limitations, it is evident, that,

l) Roe v. Rowlston, 2 Taunt.

(*n*) 1 Cent. pl. 49.

(*o*) 3 Comm. 196.

as

as his *estate* subsists, the *remainder-man's right* of entry cannot take place until the failure of issue of the tenant in tail, which may not happen for an immense number of years.

This doctrine is illustrated by the great case of Taylor v. Horde (*p*), where an estate was settled on several persons successively in tail; remainder to *A* in fee; and one of the remainder-men in tail, being out of possession, brought an ejectment, which was held to be barred by the statute of limitations. Afterwards all the tenants in tail died without issue, and the then heir at law of *A* brought an ejectment, within twenty years from the time his remainder fell into possession, and he recovered the estate.

5. After passing the act of 32 Henry VIII. and before that of the 21 Jac. I. although a man had been out of possession of land for sixty years, yet if his entry was not tolled, he might enter and bring any action of his own possession (*q*). Some writers have thought this still to be law (*r*), but the rule in this respect was altered by the statute of James; by which no person can now *enter* except within twenty years after his title accrues.

6. The rule in equity, that the statute of limitations does not bar a trust estate, holds only as between *cestui que trust* and trustee, not between *cestui que trust* and trustee on one side, and strangers on the other; for that would be to make the statute of no force at all, because there is hardly an estate of consequence without such a trust, and so the act would never take place.

Therefore, where a *cestui que trust* and his trustee are both

(*p*) 1 Burr. 60; 5 Bro. P. C. 247; Cowper, 689.

(*q*) See Bevill's case, 4 Co. 11 b.

(*r*) See Wood's Inst. 557; and Christian's note to 3 Black. Com. 196.

out of possession for the time limited, the party in sion has a good bar against both (*s*).

Although the statute cannot, as between the trustee stui *que trust*, operate as a bar to the latter, yet the may, in some cases, be barred by the possession of *tui que trust*, or those claiming under him (*t*). A *que trust* is as a tenant at will to the trustee, and his sion is the possession of the trustee (*u*); and there- nless under very particular circumstances, time could erate as a bar (*x*). Where a *cestui que trust* sells or s the estate, and the vendee or devisee obtains pos- n of the title deeds, and enters, and does no act recog- the trustee's title, there is great reason to contend is is a disseisin of the trustee, and, consequently, e statute will operate from the time of such entry. s a point which daily occurs in practice; but it happens, that a purchaser can be advised to dis- with the conveyance of a legal estate, where the will appear on the abstract when he sells. And there has been any dealing on the legal estate, and been recently noticed in the title deeds as a subsist- terest, it is clear that a purchaser must consider it h (*y*).

The statutes of limitations certainly cannot operate ween *cestuis que trust*; but it seems that equity, in

r Lord Hardwicke, in *casu* m v. Mackworth, Bar- p. Cha. 445; 15 Vin. Abr. o pl. 1; and see Townsend nend, 1 Bro. C. C. 550; Clay, 3 Bro. C. C. 639, n.; 45; Hercy v. Ballard, 4 C. 469; and Harmood v. r, 6 Ves. jun. 199; 8 Ves. 5; Hovenden v. Lord An- 2 Scho. and Lef. 629.

(*t*) See Lord Portsmouth v. Lord Effingham, 1 Ves. 430; Harmood v. Oglander, 6 Ves. jun. 199; 8 Ves. jun. 106. See 2 Mer. 360.

(*u*) See 1 Ventr. 329.

(*x*) See 3 Mod. 140; Earl of Pomfret v. Lord Windsor, 2 Ves. 472; Keene v. Deardon, 8 East, 248; Smith v. King, 16 East, 283.

(*y*) See Goodtitle v. Jones, 7 Term Rep. 47.

analogy to the statute, will hold time a bar (*z*); and indeed that equitable rights in general will, by the like analogy, be affected by time in the same manner as legal estates (*a*).

This is exemplified, in some degree, by the rules respecting an equity of redemption, which is a mere creature of the court (*b*).

In Clay *v.* Clay (*c*), Lord Camden laid down this doctrine very clearly. He said, " as often as parliament has limited the time of actions and remedies, to a certain period, in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity. For when the legislature has fixed the time at law, it would have been preposterous for equity (which by its own proper authority always maintained a limitation) to countenance laches beyond the period that law had been confined to by parliament. And therefore, in all cases where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar."

In Beckford *v.* Wade (*d*), the late Master of the Rolls, in delivering judgment, said, that it is certainly true that no time bars a direct trust as between *cestui que trust* and trustee; but if it was meant to be asserted that a court of equity allows a man to make out a case of constructive trust, at any distance of time after the facts and circum-

(*z*) See Harmood *v.* Oglander, *ubi sup.*

(*a*) See 1 Atk. 476; and Stackhouse *v.* Barnston, 10 Ves. jun. 466; Hovenden *v.* Lord Annesley, 2 Scho. and Lef. 630; Lord Egremont *v.* Hamilton, 1 Ball and Beatty, 516.

(*b*) White *v.* Ewer, 2 Ventr. 340; Pearson *v.* Pulley, 1 Cha. Ca. 102; Jenner *v.* Tracey, and Belch *v.* Harvey, 3 P. Wms. 287, n; See a full note of this case, Appendix, No. 15.

(*c*) 3 Bro. C. C. 639, n.; Ambl. 645; and see *Ex parte* Dewdney, 15 Ves. jun. 496; Medlicott *v.* O'Donel, 1 Ball and Beatty, 156.

(*d*) 17 Ves. jun. 97. See 2 Hargr. Jur. Exc. p. 394.

stances

ances happened out of which it arises, he was not aware at there was any ground for a doctrine so fatal to the curity of property as that would be; so far from it, that ot only in circumstances where the length of time would nder it extremely difficult to ascertain the true state of e fact, but where the true state of the fact is easily as-rtained, and where it is perfectly clear that relief would iginally have been given upon the ground of constructive ust, it is refused to the party who, after long acqui-cence, comes into a court of equity to seek that relief.

And it seems that even in cases of fraud, where the facts nstituting the fraud are known, where there is no sub-sting trust or continuing influence, the same principle ill apply (*e*).

But whilst the equity of redemption subsists, the ques-on to whom it belongs must remain open: and therefore ere possession without title will not give any person a ght to redeem (*f*). The right belongs to him who hows a title, although he has been out of possession up-rds of twenty years. This was so held by Sir Wil-am Grant, but Sir Thomas Plumer decided otherwise, nd his decision was affirmed in the House of Lords (*g*).

The legal provisions are so strictly adhered to, that per-ons labouring under any of the disabilities specified in the tatute of limitations, will be allowed the same time as they ould be entitled to in the case of a legal claim (*h*).

9. These observations may be closed by observing, that w cases occur in which a title depending on the statute f limitations can be recommended. The bare receipt of

(*e*) 1 Ball and Beatty, 166.
(*f*) Cholmondeley *v.* Clinton, Mer. 178.
(*g*) 2 Jac. and Walk. 1, 189 n.
(*h*) Lytton *v.* Lytton, 4 Bro. C. C. 441. Two cases on this point are now depending, Pimm *v.* Goodwin, before Lord Eldon, and Blake's case before Lord Manners in Ireland. See 2 Mer. 240.

rent is no ouster, for it is a contradiction in terms, that a man by wrong should have my right (*i*); so the non-payment of rent is no ouster, and therefore the operation of the statute must frequently be prevented by the existence of a lease granted by the person whose interest, or the interest of persons claiming under him, is wished to be barred. So (*k*) there may be a case where the circumstance of concealing a deed shall prevent the statute from barring; but then it must be a *voluntary and fraudulent* detaining; for to say that merely having an old deed in one's possession shall deprive a man of the benefit of the act, is going too far, and would be a harsh construction of a statute made for the quieting of possessions.

(*i*) Gilb. Ten. 97. See acc. Goodright *v.* Jones, Cruise on Fines, 3d edit. 295; Doe *v.* Danvers, 7 East, 299; and see Orrell *v.* Maddox, Runnington's Eject. 458; Saunders *v.* Lord Annesley, 2 Scho. and Lef. 73. See and consider Hovenden *v.* Lord Annesley, 2 Sco. and Lef. 623.

(*k*) *Per* Lord Hardwicke in *casu* Llewellyn *v.* Mackworth, Barnard. Rep. Cha. 445; 15 Vin. Abr. 126, pl. 8; 2 Eq. Ca. Abr. 579, pl. 9; and see Dormer *v.* Parkhurst, 3 Atk. 124. See also Snell *v.* Silcock, 5 Ves. jun. 469; Bowles *v.* Stewart, 1 Schoales's and Lefroy's Rep. 209; Bond *v.* Hopkins, *ib.* 413. Hovenden *v.* Lord Annesley, 2 Sho. and Lef. 607.

CHAPTER VIII.

OF THE TIME ALLOWED TO COMPLETE THE CONTRACT.

IN sales by private agreement, it is usual to fix a time for completing the contract. In such a contract the word *month* may be construed either lunar or calendar, according to the intention of the parties, to be collected from the whole instrument taken together (*a*). The time fixed is, at law, deemed of the essence of the contract (*b*); for it is the duty of the seller to be ready to verify the abstract on the day on which it was agreed that the purchase should be completed; and if he have not the title deeds in his possession, or the abstract set forth a defective title, the purchaser may resist the completion of the contract, and may recover his deposit.

In a late case, however (*c*), upon a sale by auction, the conditions stipulated that the abstract should be delivered to the purchaser *within a fortnight*, and should be returned at the end of *two months*; that a draft of the conveyance should be delivered to the purchaser within *three months*, and be returned to the seller within *four months*; and that the remainder of the purchase money should be paid on the 24th *day of June* then next, (which was five months after the sale), when the purchaser should receive his conveyance duly executed by all parties; to be prepared by

(*a*) Lang v. Gale, 1 Mau. and Selw. 111.

(*b*) Berry v. Young, 2 Esp. Ca. 640, n.

(*c*) Lang v. Gale, 1 Mau. and Selw. 111.

the seller's attorney, at the expense of the purchaser. It was contended that the stipulation in regard to the delivery of the conveyance was not a condition precedent, and it was compared to the case of Hall *v.* Cazenove (*d*), where a charter-party contained a covenant by the owner, that the ship should sail on a specified day, and the owner afterwards brought an action of covenant for the freight, it was held that he need not aver that the ship sailed on that day, although the defendant (the freighter) covenanted to pay the freight in consideration of every thing above mentioned. It was not necessary to decide the point, but Le Blanc, J. said, that it was clear that it was a condition precedent that a draft of the conveyance should be delivered to the purchaser; the question was, whether it must be done by a particular day. It was not necessary, however, to enter upon that question; if it were, it might perhaps be material to advert to the rule, that where a condition does not go to the whole consideration (*e*) of the contract, but to a part only, it is not a condition precedent. Bayley, J. was of the same opinion. It was not a condition precedent that the draft should be delivered by a particular day, for he did not consider the precise time of the delivery as an essential ingredient in that condition which was meant only to secure a delivery within a reasonable time.

The general opinion has always been, that the day fixed was imperative on the parties at law. This was so laid down by Lord Kenyon, and has never been doubted in practice. The contrary rule would lead to endless difficulties. In the above case, for example, the different times appointed, 1. for delivery of the abstract; 2. for the return of it; 3. for the delivery of the conveyance; 4. for the return of it; and 5. for the completion of the pur-

(*d*) 4 East, 477. (*e*) See Havelock *v.* Giddes, 10 East, 564.

chase,

chase, were all links of the same chain, and if one link were broken, the whole chain would be destroyed. If the time appointed for the delivery of the conveyance was not an essential ingredient, but was meant only to secure a delivery within a reasonable time, it follows that the same rule must apply to the time fixed for the return of it, and also to the time appointed for the completion of the purchase. The effect of this rule would be, that the appointment of a day would have no effect, and in every case it must be referred to a jury to consider whether the act was done within a reasonable time. The precise contract of the parties would be avoided, in order to introduce an uncertain rule, which would lead to endless litigation. This cannot be compared to a case like Hall *v.* Cazenove. There the ship did sail without being countermanded, and the substance of the covenant was considered to be, that the ship should go to the place named on freight and return again, and if the freighter sustained any damage by reason of the ship not having sailed on the particular day, he might recover it by bringing an action on the covenant. The covenants in favour of justice were not considered as dependent on each other. It would be monstrous that the ship should be permitted to sail to the place named, and return again, and yet not earn any freight, because it did not sail on the day appointed. So where covenants go only to a part of the consideration, and a breach may be paid for in damages, the defendant has a remedy on the covenant, and shall not plead it as a condition precedent. If *A* covenant with *B* to build a house for him according to a certain plan, and *B* covenant with *A* to pay for the house so built, it is clear, notwithstanding some authorities to the contrary, that if *A* build a house, although not strictly according to the plan, yet *B* must pay for it, and may recover in a distinct action against the builder for

any damage sustained by the departure from the plan. The justice of this is evident. But in the case under consideration, the agreements go to the whole consideration on both sides; they are mutual conditions; the one precedent to the other (*f*). If the draft of the conveyance, for instance, is not delivered on the day appointed, the party who ought to deliver it has broken his agreement, and cannot therefore recover upon it at law. This works no injustice; for the further execution of the contract is at once stopped; the seller retains his estate, and the purchaser his purchase money, and the party making default is liable, as he ought to be, to an action for breach of his engagement. It is to be hoped, therefore, that the day appointed will always be deemed of the essence of the contract at law. It has so been held in a recent case in the Common Pleas (*g*). And in a later case upon a sale of goods, where fourteen days were allowed from the day of sale *to the purchaser* to clear away the goods, the seller was not prepared to deliver them the day after the sale to the purchaser, who applied for them; and it was held, that he (the seller) had broken his agreement, and could not recover against the purchaser, who refused to perform the contract (*h*).

But *equity*, which from its peculiar jurisdiction is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will in certain cases carry the agreement into execution, notwithstanding that the time appointed be elapsed; for, as Lord Eldon remarks, the title to an estate requires so much clearing and inquiry, that unless substantial objections appear, *not merely as to the*

(*f*) Boone *v.* Eyre, 1 H. Blackst. 273. See 10 East, 564.

(*g*) Wilde *v.* Forte, 4 Taunt. 334.

(*h*) Hagedon *v.* Laing, 1 Maul. 514; and see Cornish *v.* Rowley, *post*.

time,

e, but an alteration of circumstances affecting the value the thing; or objections arising out of circumstances, *not rely as to the time*, but the conduct of the parties during time; unless the objection can be so sustained, many the cases go the length of establishing, that the objecns cannot be maintained (*i*). Perhaps there is cause to pret that even *equity* assumed this power of dispensing h the literal performance of contracts in cases like these. Objections on account of delay seem divisible into two ds. The one where the delay is attributable to the lect of either party; the other where the delay is unidably occasioned by the state of the title; and of each these we shall treat in its order.

SECTION I.

Of Delays occasioned by the Neglect of either Party.

THE time fixed on for the completion of a contract, s formerly paid less attention to in equity than it now which seems to have arisen from the case of Gibson *v.* terson (*k*), where, according to the report, a specific formance was decreed in favour of the plaintiff, the dor, without any regard had to his negligence in not ducing his title deeds, &c. within the time limited. d Lord Hardwicke is reported to have said, that most the cases which were brought into the Court, relating

(*i*) *Per* Lord Eldon, see 7 Ves. 274; and see Hearne v. Tenant, 13 Ves. jun. 287. See Lennon v. Napper, 2 Scho. and Lef. 683.

(*k*) 1 Atk. 12.

to

to the execution of articles for the sale of an estate, were of the same kind, and liable to that objection; but that he thought there was nothing in the objection.

It appears, however, that this case is mis-reported; for Lord Rosslyn, in Lloyd *v.* Collett (*l*), said he had looked into the case of Gibson *v.* Paterson, in which the reporter had made Lord Hardwicke treat the time as totally immaterial. He said, it was to be observed, that the circumstances of that case, of which he had taken a copy, did not call for any such opinion. The purchaser, who hung back, had bought an estate in mortgage. The contract took place in November, and was to be completed in February; in that time, therefore, the mortgage could only be paid off by treaty with the mortgagee. Upon the facts it appeared, that application had been made to the mortgagee, who consented to take his money. Drafts of conveyance were made, and countermanded by the purchaser. He had, after the contract, demised part of the estate to the vendor at a rent; and, upon application being made to him, every thing being ready, he said he would be off the bargain; he had no money to pay for it; and if they attempted to force him, he would go to Scotland to avoid it. Lord Rosslyn added, there could not be the smallest argument upon it, nor the least doubt about the decree.

But whatever opinion Lord Hardwicke entertained on this subject (*m*), it is now settled, that a man cannot call upon a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt and eager; and therefore time alone is a sufficient bar to the aid of the Court.

(*l*) 4 Ves. jun. 690, n.; and see 4 Bro. C. C. 497. See Radcliffe *v.* Warrington, 12 Ves. jun. 326; Alley *v.* Deschamps, 13 Ves. jun. 225.

(*m*) See 1 Ves. 450.

Thus,

Thus, in a case (*n*) where the parties differed as to the construction of an agreement, and after a delay of seven years one of the parties filed a bill for a specific performance, it was dismissed merely on account of the staleness of the demand.

A bill for a specific performance is an application to the discretion, or rather to the extraordinary jurisdiction of equity, which cannot be exercised in favour of persons who have long slept upon their rights, and acquiesced in a title and possession adverse to their claim. Due diligence is necessary to call the Court into activity, and where it does not exist, a court of equity will not lend its assistance; it always discountenances laches and neglect (*o*).

If the vendor be not ready with his abstract and title deeds at the day fixed, the purchaser may avoid the agreement at law.

Thus, in a case (*p*) where upon a sale it was agreed that a good title should be made out by the 10th of July; in the beginning of July the purchaser called on the vendor to show him the title deeds; but he not having them in his possession, gave the purchaser an abstract of the title, which did not contain any of the deeds; and although it was suggested that an application ought to have been made to the vendor at an earlier period, yet Lord Kenyon ruled otherwise, as the seller, he said, ought to be prepared to produce his title deeds at the particular day.

This rule does not, however, prevail in equity; for it is there considered equally incumbent on the purchaser to ask for the abstract, as for the vendor to deliver it. And, therefore, if a purchaser do not call for the abstract before

(*n*) Milward v. Earl of Thanet, 5 Ves. jun. 720, n. (*b*). See Alley v. Deschamps, 13 Ves. jun. 225.

(*o*) *Per* Lord Manners, 1 Ball and Beatty, 68.

(*p*) Berry v. Young, 2 Esp. Ca. 640, n.; *vide supra*, p. 341.

the time agreed upon for its delivery (*q*), or do not ask for it until it has become impossible to execute the agreement by the day fixed (*r*), equity will consider the time as waved.

So, if the purchaser receive the abstract after the day appointed, and do not at the time object to the delay, he cannot afterwards insist upon it as a bar to a performance *in specie* (*s*).

It is, however, clearly settled, that a specific performance shall not be enforced, where no steps have been taken by the vendor, although in proper time urged by the purchaser to do so, and the purchaser, immediately when the time is elapsed, insists upon his deposit, and refuses to perform the agreement.

This was decided in Lloyd *v.* Collett (*t*); the case was, that on the 10th August 1792, the defendant contracted for the purchase of the estate, the purchase to be completed on or before the 25th of March 1793, and had frequently between those times applied for an abstract of title, but could not obtain one. Shortly after the 25th of March 1793, the purchaser applied for his deposit, with interest from the 10th of August 1792, when he paid it; and afterwards repeatedly applied for it before the 10th of June 1793, when he brought an action for the deposit. On the 16th September 1793, an abstract was delivered; the purchaser was then out of town, and on his return, on the 25th of October, wrote, insisting that he would not complete his purchase. On the 6th of November the bill

(*q*) Guest v. Homfrey, 5 Ves. jun. 818.

(*r*) Jones v. Price, 3 Anstr. 924.

(*s*) Smith *v.* Burnam, 2 Anstr. 527; and see Seton *v.* Slade, 7 Ves. jun. 265.

(*t*) 4 Bro. C. C. 469; 4 Ves. jun. 689. See 5 Ves. 737; 7 Ves. jun. 278; and see Pincke v. Curteis, stated *infra*; Potts *v.* Webb, 4 Bro. C. C. 330, cited; Paine v. Meller, 6 Ves. jun. 349; and Warde v. Jeffery, 4 Price, 294.

was

was filed by the vendor for a specific performance, and for an injunction to restrain the proceedings at law. Lord Rosslyn said, the conduct of parties, inevitable accident, &c. might induce the Court to relieve; but it was a different thing to say, that the appointment of a day was to have no effect at all, and that it was not in the power of the parties to contract, that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it. And he therefore considered the contract as at an end.

But where a vendor has proceeded to make out his title, and has not been guilty of gross negligence, equity will assist him, although the title was not deduced at the time appointed.

Thus, in Fordyce *v.* Ford (*u*), the purchase was to be completed on the 30th July 1793. The abstract was not delivered until the 8th, and the treaty continued until the 25th of September, on which day the deeds were delivered, and every difficulty cleared up; when the purchaser refused to proceed, alleging that he wanted the estate for a residence for the last summer, and insisting he was not bound to go on, on account of the delay. The Master of the Rolls said, the rule certainly was, that where in a contract either party had been guilty of gross negligence, the Court would not lend its assistance to the completion of the contract; but in this case he thought there had been no such negligence, and decreed accordingly; adding, that he hoped it would not be gathered from thence, that a man was to enter into a contract, and think he was to have his own time to make out his title.

The rules on this subject apply, as they ought to do, to each party. And therefore, where a purchaser permits a long time to elapse, without evincing a fixed marked

(*u*) 4 Bro. C. C. 494; Radcliffe *v.* Warrington, 13 Ves. jun. 323.

intention

intention to carry his contract into execution, he will be left to his remedy at law, although he may have paid part of the purchase money. He is not to be suffered to lie by, and speculate on the estate rising in value (*x*). Nor will he be assisted by equity, where he has made frivolous objections to the title, and trifled, or shown a backwardness to perform his part of the agreement, especially if circumstances are altered (*y*). And where the price is unreasonable or inadequate, or the contract is in other respects inequitable, equity will not assist either party, if he has permitted the day appointed for completing the contract to elapse without performing his part of the agreement (*z*).

The time, however, is more particularly attended to in sales of reversions; for it is of the essence of justice that such contracts should be executed immediately, and without delay. No man sells a reversion who is not distressed for money; and it is ridiculous to talk of making him a compensation by giving him interest on the purchase money during the delay (*a*).

So time is very material where the estate is sold in order to pay off any incumbrance bearing a higher rate of interest than the vendor is entitled to receive, in respect of the purchase money, during the delay (*b*).

(*x*) Harrington *v.* Wheeler, 4 Ves. jun. 686; Alley *v.* Deschamps, 13 Ves. jun. 225.

(*y*) Hayes *v.* Caryll, 1 Bro. P. C. 27; 5 Vin. Abr. 538, pl. 18; Spurrier *v.* Hancock, 4 Ves. jun. 667; Pope *v.* Simpson, 5 Ves. jun. 145; and Coward *v.* Odingsale, 2 Eq. Ca. Abr. 688, pl. 5; and see Green *v.* Wood, 2 Vern. 632; Bell *v.* Howard, 9 Mod. 302; and Main *v.* Melbourn, 4 Ves. jun. 720.

(*z*) *Vide ante*, ch. 5; and Whorwood *v.* Simpson, 2 Vern. 186; Lewis *v.* Lord Lechmere, 10 Mod. 503.

(*a*) Newman *v.* Rogers, 4 Bro. C. C. 391; and see Spurrier *v.* Hancock, 4 Ves. jun. 667.

(*b*) Popham *v.* Eyre, Lofft, 786; and see a case cited in 2 Scho. and Lef. 604.

SECTION II.

Of Delays occasioned by the State of the Title.

It may be laid down as a general proposition, that a delay accounted for on the above ground will not prevent a specific performance being decreed, where the time fixed for completing the contract is not material. Thus, if an estate was described as in good repair, and it turned out to be in bad repair, and several months may be required to repair it, yet the purchaser cannot resist the contract on the ground of time, unless it could be clearly shown, that he wanted possession of the house to live in at a given period, by which time the repairs could not be completed (*c*). So if the estate is in lease, and it was stated that the purchaser would be entitled to possession several months before the lease actually expire, yet he cannot rescind the agreement, unless the personal occupation of the estate was essential to him at the time appointed (*d*).

Where time is not material, and the title is bad, but the defect can be cured, if the vendee is unwilling to stay, the vendor should file a bill in equity to enforce the performance of the contract (*e*); for it is sufficient if the party entering into articles to sell has a good title at the time of the decree; the direction of the court being, in all these cases, to inquire whether the seller *can*, not whether he

(*c*) See Dyer *v.* Hargrave, 10 Ves. jun. 505, *supra*, p. 254.

(*d*) Hall *v.* Smith, Rolls, 18 Dec. 1807, MS.; S. C. 14 Ves. jun. 426; and see 13 Ves. jun. 77.

(*e*) See 6 Ves. jun. 655; 10 Ves. jun. 315.

could, make a title at the time of executing the agreement.

This principle was followed in a case of frequent reference (*f*). And in a late case (*g*), the vendor, at the time he filed the bill for a specific performance, had only a term of years in the estate, of which he had articled to sell the fee-simple, and after the bill was filed, procured the fee by means of an act of parliament; and as the day on which the contract was to be carried into execution was not material, a specific performance was decreed.

The same rule prevails at law, *where no time is fixed for completing the contract*, and an application for the title has not been made by the purchaser, previously to an action by the vendor for breach of contract. For in Thompson *v.* Miles (*h*), a man agreed to sell a term of which he stated forty years to be unexpired. It appeared there were only thirty-nine, but by an ageement endorsed on the lease, the lessor agreed to add one year to the unexpired term. This agreement was dated after an action brought by the vendor for damages on breach of agreement; and Lord Kenyon ruled, that the vendor having at that time a good title was sufficient. His Lordship said, that it had been solemnly adjudged, that if a party sells an estate without having title, but before he is called upon to make a conveyance, by a private act of parliament gets such an estate as will enable him to make a title, that is sufficient: that here the plaintiff being enabled to make a title, and the defendant never having applied for it, he should not be allowed to set up against the plaintiff a want of title, though the power of making that title was obtained after the action was brought.

(*f*) Langford *v.* Pitt, 2 P. Wms. 629; and see Jenkins *v.* Hiles, 6 Ves. jun. 646; Seton *v.* Slade, 7 Ves. jun. 265.

(*g*) Wynn *v.* Morgan, 7 Ves. jun. 202.

(*h*) 1 Esp. Ca. 184.

But

But if the vendor cannot verify his abstract at the time appointed, or if he produce a defective title, and the purchaser bring an action for recovery of the deposit, the vendor having a title at the time of the trial will not avail him. Thus, in Cornish *v.* Rowley (*i*), where a purchaser sought to recover his deposit, it appeared that the abstract of the title began in the year 1793, and after reciting that the deeds relating to the estate had been lost, stated a fine and nonclaim. Upon inquiry, it was found that the fact of the deeds having been lost was not true. The counsel for the defendant said they were ready to make out a good title. Lord Kenyon said, that the vendor must be prepared to make out a good title on the day when the purchase is to be completed. Indulgence, he was aware, was often given for the purpose of procuring probates of wills, &c. But this indulgence was voluntary on the part of the intended purchaser. It is the duty of the seller to be ready to verify his abstract at the day on which it was agreed that the purchase should be completed. If the seller deliver an abstract, setting forth a defective title, the plaintiff may object to it. No man was ever induced to take a title like the present. A fine and nonclaim are good splices to another title, but they will not do alone. There are many exceptions in the statute in favour of infants, femes covert, &c. As a good title was not made out at the day fixed, he should direct the jury to find a verdict for the deposit, with interest up to that day. And a verdict was found by the jury accordingly.

So, in Bartlett *v.* Tuchin (*k*), assignees of a bankrupt sold an estate, and no time was fixed for completing the purchase. The purchaser upon a supposed defect of title

(*i*) B. R. Midd. Sitt. after M. T. 30 Geo. III.; 1 Selw. N. P. 160.

(*k*) 1 Marsh. 583.

 abandoned

abandoned the contract; *afterwards* the commission was superseded, and a new one issued, under which the same assignees were chosen. It was held that the purchaser might rescind the contract, for at the time he gave notice of his abandonment of the contract, the assignees could not make out a good title. And in a late case (*l*), the facts were, that upon a sale it was agreed that the purchase money should be paid on or before Lady-day 1803, on having a good title. The vendors were assignees of a bankrupt who claimed under a will. They thought that he had an estate tail under the will, and that therefore they could make a title; but under the devise he only took for life, with contingent remainders over. The bankrupt, however, being heir at law of the testator, could make a title by levying a fine, and was willing to join; but these facts were not stated in the abstract delivered, or communicated to the purchaser until a fortnight before the assizes. The Court, after showing that the bankrupt took only an estate for life under the devise to him, said, as it was stated, that previous to the time fixed for payment of the money, and completion of the purchase, or indeed till near the time of trial, no information was given to the purchaser that the bankrupt was heir at law of the testator, but the title of the assignees appeared to have been delivered in, on the supposition of the bankrupt being tenant in tail, they thought that the defendant had failed in making good the agreement on his part; and that thereupon a right of action at law had accrued to the plaintiff. How far the title since communicated might in another course of proceeding in another place, render the present proceeding abortive; and whether the plaintiff

(*l*) Seward v. Willock, 5 East, 198; 1 Smith's Rep. 390, S. C.; and see Radcliffe v. Warrington, 12 Ves. jun. 326, where the purchaser recovered at law.

might

might not be ultimately compelled to fulfil his agreement, was not for them in that action to decide (I).

In an early case (*m*) the Court of Chancery carried this doctrine very far; for at the time of the articles for sale, or even when the decree was pronounced, Lord Stourton, the vendor, could not make a title, the reversion in fee being in the Crown; and yet the Court indulged him with time more than once for the getting in the title from the Crown, which could not be effected without an act of parliament, to be obtained in the following session; however, it was at length procured, and Sir Thomas Meers decreed to be the purchaser (II); and even at this day, although the Master report against the title, yet if it appear that he will have a title upon getting in a term, or procuring letters of administration, &c. the Court will not release the purchaser; but will put the vendor under terms to complete his title speedily (*n*).

And where a purchaser enters into, or proceeds in a treaty, after he is acquainted with defects in the title, and knows that the vendor's ability to make a good title depends on the defects being cured, he will be held to his bargain, although the time appointed for completing the contract is expired, and *considerable further time* may be required to make a good title.

(*m*) Lord Stourton *v.* Sir Thomas Meers, stated in 2 P. Wms. 631; and see Sheffield *v.* Lord Mulgrave, 2 Ves. jun. 526; Omerod *v.* Hardman, 5 Ves. jun. 722.

(*n*) Coffin *v.* Cooper, 14 Ves. jun. 205.

(I) It should seem that he could not be compelled to take the title, for equity does not countenance the destruction of contingent remainders. See Roake *v.* Kidd, 5 Ves. jun. 647.

(II) Note, it appears that Sir Thomas Meers was mortgagee of the estate; (see Sir Thomas Meers *v.* Lord Stourton, 1 P. Wms. 46;) and it is therefore probable that at the time he entered into the contract, he was aware of the defects in the title.

Thus in a case(*o*), where it was agreed upon a purchase, that it should be completed on the 5th April 1792, it appeared that the purchaser had applied for an abstract at the latter end of January, or the beginning of February, which not being sent to him, he, after the expiration of the time for the completion of the purchase, applied for his deposit, saying, that he should not proceed in his purchase. About the 21st of April, an abstract was sent him, and it appeared that a suit in Chancery must be determined before a title could be made, upon which he again declared he would not proceed in the purchase, and again required his deposit. In Trinity term he brought an action for his deposit, and, on the 6th of November, the bill was filed. The purchaser, by his answer, stated that the suit was still depending, and that questions of law had arisen, which then stood for argument in the Court of King's Bench.

The Lords Commissioners Ashurst and Wilson granted an injunction, which was continued by Lord Rosslyn, who said, in these contracts (sales by auction) in general, the time of completing the contract is specified, and a deposit is paid; and if the title is not made out by the time, the vendee is entitled to take back his deposit. But in this case *the vendee was apprised of the title depending on the ability of the vendors to make a good title, which itself depended on the event of a Chancery suit, and was, notwithstanding, willing to go on with his purchase; there had been a communication of the delay of the suit, and the present bill was filed after great delay* (I). If the vendee

(*o*) Pincke *v.* Curteis, 4 Bro. C. C. 329; and see Smith *v.* Burnam, 2 Anstr. 527; and Paine *v.* Meller, 6 Ves. jun. 349; Warde *v.* Jeffery, 4 Price, 294; see Smith *v.* Sir Thomas Dolman, 6 Bro. P.C. 291, by Tomlins.

(I) The judgment shows the true ground of the decree; but according to the state of facts in the report, the case was similar to that of Lloyd *v.* Collet, stated *supra*, p. 346.

had

had called for his deposit at the end of the time limited for completing the purchase, and insisted he would not go on with his purchase, the Court would not have compelled him. The cause was afterwards heard before the Master of the Rolls, who was also of opinion, that there had been a sufficient communication of the real state of the delay, and that the purchaser had acquiesced in it, or at least not sufficiently declared his dissent to go on with the purchase; and therefore it was referred to the Master to inquire as to the title.

So in Seton *v.* Slade (*p*), it appeared that the purchaser was aware of the objections to the title at the time he purchased the estate, and afterwards accepted the abstract within a few days of the time appointed for completing the contract. He had, however, previously declared, that if the title was not made out by the time, he would relinquish the contract; and the day after the time appointed, he actually applied for his deposit, alleging that the abstract, so far from showing a right in the vendor to convey, stated merely a contract for the purchase by him, without noticing a suit in Chancery. But the purchaser having been aware of the objections to the title, and having afterwards received the abstract, a specific performance was decreed.

Although a treaty may have lain dormant for some time, yet if the contract is not abandoned, a performance will be decreed *in specie*.

Thus in a case (*q*) where, upon objections to a title, the treaty had proceeded for about two years, when the vendor's solicitor wrote, calling for a distinct answer, saying, that otherwise he must be under the necessity of filing a bill. No answer was returned to the letter, nor was any

(*p*) 7 Ves. jun. 265. See Wood *v.* Bernal, 19 Ves. 220.

(*q*) Marquis of Hertford *v.* Boore, 5 Ves. jun. 719. See Milward *v.* Earl of Thanet, 5 Ves. jun. 720, n. (*b*).

notice given that the purchaser considered the contract as abandoned; neither had he brought any action for the deposit. The bill was filed after a delay of about fourteen months, and the defendant resisted a specific performance on the ground of delay, by which, he stated, he had suffered material inconvenience, having purchased the place as his residence, and that he was induced to consider the contract as abandoned. A specific performance was however decreed.

But if a purchaser object to the title, and declare he will not complete the contract, and the vendor acquiesce in this declaration, he cannot afterwards clear up the objections to his title, and compel the purchaser to perform the agreement. This was decided in the case of Guest v. Homfray (*r*). The purchaser took objections to the title, and was informed that no better title could be made; whereupon he said, he would not proceed in the purchase, and afterwards returned the abstract, at the desire of the vendor, at the same time acquainting him (the vendor) that he (the purchaser) still considered the contract was at an end. In about eight months after this, the abstract was returned, with the objections answered, and the bill was filed upon the defendant refusing to complete the contract. But the bill was dismissed, although it was clear that the purchaser had almost all the time wished to be off the bargain. Lord Alvanley, then Master of the Rolls, said, they should have cautioned the purchaser, and told him they were going on to make out a title. If they had done all that, and shown a probable ground to the purchaser that they might make a good title, Lord Alvanley said, he should perhaps not have thought a year too long.

Where circumstances are such that the purchase-money

(*r*) 5 Ves. jun. 818.

cannot

cannot be paid for a length of time, as if the purchaser die, or become bankrupt before the contract be carried into effect, and his executors, or assignees, are not able to get in the assets or effects, the vendor is entitled to require the contract to be rescinded, and he will be allowed his costs (*s*); or he may demand a specific performance; and if the defendants are unable or unwilling to perform the contract, that the estates may be resold; and if the purchase money arising by the resale, together with the deposit, shall not amount to the purchase money, that the defendant may pay the deficiency.—A bill for the latter purposes was filed by a vendor against the assignees of a bankrupt, and a decree was made for resale. The deficiency upon that resale was 5,016 *l.*; and the cause coming on for further directions, Lord Rosslyn directed that sum to be proved under the commission; saying, the whole purchase money was the debt, and the vendor had a lien on the estate (*t*); which proving by the resale deficient, the residue was to be proved under the commission (*u*).

In a late case, where an estate was sold by auction, in order to pay off incumbrances, under the usual conditions, and the purchase was to be completed on the 25th of March 1805, the estate was sold for 123,000 *l.* and the purchaser paid only 4,000 *l.* as a deposit, when he ought to have paid 24,000 *l.* A short time previously to Lady-day he wrote a letter to the vendors, acknowledging his inability to pay, and requesting them to join in a resale, offering to pay any loss by the second sale. This they refused; and he not having the money ready, on the 27th of March 1805, filed a bill for a specific perform-

(*s*) Mackreth *v.* Marlar, 1 Cox, 259; Cox's n. (1) to 2 P. Wms. 67; Whittaker *v.* Whittaker, 4 Bro. C. C. 31. See Sir James Lowther *v.* Lady Andover, 1 Bro. C. C. 396; Dickenson *v.* Heron, *infra*, ch. 10.

(*t*) *Vide supra*, ch. 1.

(*u*) Bowles *v.* Rogers, 6 Ves. jun. 95, n.

ance, evidently to gain time. The vendors filed a cross bill; and afterwards the purchaser became a bankrupt, when the causes were revived. The expenses of the vendors, in payment of the auction duty, &c. were very considerable. The cross cause came on first, the assignees of course could not bind themselves to pay the money; and the contract was decreed to be delivered up and cancelled, so that the vendors became entitled to the 4,000*l.* deposit (*x*).

We are now to consider whether equity will permit the parties to make time the essence of the contract.

In Williams *v.* Thompson or Bonham (*y*), the bill was to carry into execution the trusts of a will, and for a specific performance of an agreement by Bonham, to purchase a real estate of the defendants. By the agreement, dated the 9th of July 1778, it was particularly expressed, "that in case a good title to the premises, discharged from all claims and demands whatsoever, should not be made out to the satisfaction of Bonham within three years from the date thereof, the agreement thereby made, so far as concerned the purchase of the premises, (for the agreement contained other stipulations), should from thenceforth become void." The defendant was always ready to have completed his purchase, but the trustees under the will were incapable of making out a title without the aid of equity, and for that purpose the bill in question was filed in February 1781. The cause came to a hearing on the 29th of June 1782, when the defendant (Bonham) insisted, that the title not having been made out at the time mentioned in the agreement, he was discharged from his

(*x*) Steadman *v.* Lord Galloway, *et e contra*, Rolls, 9th Feb. 1808.

(*y*) 4 Bro. C. C. 331, cited; Newl. Contr. 238, stated. See the case in Lib. Reg. B. 1781, fol. 564.

purchase.

. But Lord Thurlow was of opinion, that the
l by the articles for making a title to the defen-
only formal, and not of the essence of the agree-
d, as appears by the Register's book, he declared,
three years being expired was not a sufficient
to the agreement being performed.
se depends so much on its own complicated cir-
s, as scarcely to admit of being cited as an au-
hich should rule any other case. I find, from
ster's book, that it was impossible to make a title
decree. The agreement, which was very long
al, stated all the facts; and it was expressly sti-
hat the trustees should use their utmost endea-
obtain a decree, and the purchaser was imme-
t into possession. Now the bill was filed before
ation of the three years, no laches was imputed
stees, and it did not appear that the purchaser
ined any loss, or been put to any inconvenience.
therefore have been a strong measure to have
t the time was of the essence of the contract.
haser entered into the contract with full know-
all the obstacles in the way of making a title;
s the purchase was completed, there was no
ndemnifying the trustees for the expense incurred
hancery suit.
case of Gregson *v.* Riddle (*z*), which was also
ord Thurlow, the agreement was for a particular
h a proviso, that in case the title should not be
l in two months, the agreement was to be void
effect. There was an outstanding legal estate,
uld not be got in by that time. A bill was filed
urpose, to have the legal estate conveyed. The
t resisting, a reference was directed, to see whe-

(*z*) 7 Ves. jun. 268, cited.

ther

ther a good title could be made; Lord Loughborough, then Lord Commissioner, expressing an opinion, that the terms of the agreement were complied with (I). The report was in favour of the title. The cause coming on before Lord Thurlow, the performance was still resisted. Lord Thurlow said, it had been often attempted to get rid of agreements upon this ground, but never with success. The utmost extent was to hold it evidence of a waver of the agreement; but it never was held to make it void. Mr. Mansfield, for the defendant, said, the intention was clearly to make it void; and that it would be necessary to insert a clause, that notwithstanding the decision of the Court of Chancery, it should be void. Lord Thurlow said, such a clause might be inserted; *and the parties would be just as forward as they were then.*

On this *dictum* it must be remarked, that the case did not call for it, as the agreement appears to have been *substantially* performed within the time. And it is said, that in Potts *v.* Webb, before Lord Thurlow, it being part of the terms that the purchase should be completed by a certain time, his Lordship thought that a good reason for not decreeing a specific performance (*a*). At the same time it must be admitted, that Lord Thurlow entertained a floating opinion, that time could not in general be made of the essence of the contract. It does not appear, however, that any case ever came before him in which he was

(*a*) 4 Bro. C. C. 330, cited.

(I) The stipulation was, that in case the title should not be approved of by the purchaser's counsel within two months, the articles should be void. The difficulty upon the title arose upon a settlement which the seller insisted was voluntary, and not upon a mere outstanding legal estate. The *seller* insisted upon being at liberty to rescind the contract, under the clause in the articles.

called

called upon to decide the point, and his opinion has not been followed in subsequent cases.

For in Lloyd *v.* Collet (*b*), in which the case of Gregson *v.* Riddle was cited, Lord Chancellor Loughborough said, the conduct of the parties, inevitable accident, &c. might induce the Court to relieve; but it was a different thing to say, the appointment of a day was to have no effect at all, and that it was not in the power of the parties to contract, that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it.

And in the late case of Seton *v.* Slade (*c*), Lord Eldon said, he inclined much to think, notwithstanding what was said in Gregson *v.* Riddle, that time may be made the essence of the contract.

The case under consideration has been assimilated to a mortgage, where, although the parties may have expressly stipulated, that if the money be not paid at a particular time, the mortgagor shall be foreclosed, yet equity will permit him to redeem, in the same manner as if no such stipulation had been entered into. There does not appear to be any analogy between the cases. In a mortgage such a declaration is inserted by the mortgagee for his own advantage; but as the land is merely a security for the debt, equity rightly considers that a mortgagee ought only to require his principal and interest, and not to obtain the estate itself, by taking advantage of the necessities of the mortgagor. Once a mortgage and always a mortgage, has therefore become a maxim; and under this axiom equity is indeed administered; the parties being put in

(*b*) 4 Bro. C. C. 469; 4 Ves. jun. 689; note stated *supra*.

(*c*) 7 Ves. jun. 265; and see Lewis v. Lord Lechmere, 10 Mod. 503. See also 3 Ves. jun. 693; 12 Ves. jun. 333; 13 Ves. jun. 289; 2 Mer. 140; Levy v. Linde, 3 Mer. 81; Warde v. Jeffery, 4 Price, 294.

possession

possession of their respective rights without detriment to each other. The same reasoning seems to apply to relief against a penalty. But in an agreement for sale of an estate, where it is expressly declared that the contract shall be void if a title cannot be made by a stated time, the parties themselves have *mutually* fixed upon the time; the *bona fides* of such a transaction seems to be a bar to the interference of a court of equity; and if the contract be vacated by virtue of the agreement, the parties will still be in the possession of their respective rights. We may, therefore, perhaps, venture to assert, that if it *clearly appear to be the intention of the parties* to an agreement, that time shall be deemed of the essence of the contract, it must be so considered in equity (*d*). In the late case of Hudson *v.* Bartram (*e*), the Vice-Chancellor said, that the principle was admitted now that time may be made of the essence of the contract. Why are not parties to insert such a stipulation in their contract? It is difficult to understand how the doubt arose, but it is now at an end.

It remains to observe, that *where no time is limited for the performance of the agreement*, the cases considered under the first division in this chapter, will assist the student in forming a judgment in what instances equity will assist a party who has been guilty of laches, although every case of this nature must in a great measure depend upon its own particular circumstances. The cases classed under the second division apply, however, with greater force to cases where no time is limited than to those where a day is fixed, for in the former cases, the Court has not to struggle against an express stipulation of the parties.

(*d*) See Appendix, No. 6.

(*e*) 12 Dec. 1818. MS.; S. C. 3 Madd. 440; and see Boehm *v.* Wood, 1 Jac. and Walk. 419.

A case

A case came before the Lords Commissioners in 1792 (*f*), where no time was limited for performing the agreement. The plaintiff was one of two devisees in trust to sell, and pay debts, and had alone sold the estate (I), and entered into articles with the defendant. The co-trustee afterwards refused to join; and there was a mortgagee who refused to be paid off. Neither of these circumstances was disclosed to the purchaser, and upon this delay in the title he proceeded to bring his action against the vendor for a breach of the agreement. The plaintiff brought his bill to compel a specific performance, and to have the co-trustee join; and the mortgage redeemed, and to stay the action. The defendant suffered an injunction to go against him for want of an answer; and having afterwards answered, a motion was made to dissolve the injunction; and the cause shown by the plaintiff was, the possibility of making a good title by this very suit. The Court held the purchaser bound, and continued the injunction.

In this case it appears from the Register's book, that the purchaser insisted on his purchase, and that the injunction should be dissolved; which was certainly a very important feature in the cause. It was not the case of a man merely seeking to recover his deposit. It must, however, be repeated, that it is impossible to lay down any general rule applicable to cases where no time is appointed for performing the agreement. Indeed, throughout this chapter, it has been found impossible to treat the subject of it in an elementary manner.

(*f*) Tyrer *v.* Artingstall, Newl. Lib. B. 1792, fo. 28. nom. Tyrer Contr. 236. See the case in Reg. *v.* Bailey.

(I) The estate was sold by auction *with the concurrence of the other trustee.* The plaintiff, however, only signed the agreement.

CHAPTER IX.

OF THE ABSTRACT AND CONVEYANCE: THE ASSIGNMENTS OF TERMS, ATTESTED COPIES AND COVENANTS FOR TITLE, TO WHICH A PURCHASER IS ENTITLED: OF SEARCHING FOR INCUMBRANCES: AND OF RELIEF IN RESPECT OF INCUMBRANCES.

SECTION I.

Of the Abstract and Conveyance.

THE vendor must at his own expense furnish the purchaser with an *abstract* of his muniments (I), and deduce a clear title to the estate. The abstract ought to mention every incumbrance whatever affecting the estate, and should, therefore, contain an account of every judgment by which the estate is affected (*a*); but equity considers it complete whenever it appears, that upon certain acts done, the legal and equitable estates will be in the purchaser; which may be long before the title can be completed (*b*).

The abstract is delivered for the following purposes: 1st, That the purchaser may see whether the title is such as he will accept. He has also a right to it after he has taken an opinion, in order to take another opinion in case he is

(*a*) Richards *v.* Barton, 1 Esp. Ca. 268.

(*b*) See 8 Ves. jun. 436; and 1 Jac. and Walk. 421.

(I) Formerly the title-deeds themselves were delivered to the purchaser, and his solicitor prepared the abstract at his expense; and the abstract was compared with the title-deeds by the counsel before whom it was laid. See Temple *v.* Brown, 6 Taunt. 60.

not

satisfied with that, and for the purpose of taking fur- objections, and of further considering the title. He t have it too for another purpose, to assist him in pre- ng his conveyance, that he may see who must be made ies, what form of conveyance is expedient, what par- are to be inserted, and the like (*c*). As to the gene- property in the abstract, it is hard to say who may it; while the contract is open, it is neither in the lor nor in the vendee absolutely; but, if the sale goes it is the property of the vendee; if the sale is broken it is the property of the vendor. In the mean time vendee has a temporary property, and a right to keep ven if the title be rejected, until the dispute be finally ed, for his own justification, in order to show on what nd he did reject the title (*d*). If the purchase go off, only is the abstract to be returned, but no copy to kept, lest it should be used for a mischievous pur- (*e*); and although the purchaser pays for the opinion, for the same reason, that ought, it should seem, to be ned with the abstract (*f*).

a case where the purchaser returned the abstract to seller, to answer the queries and opinion of counsel, it held, that he (the purchaser) might maintain trover nst the seller for the abstract, although the seller him- might ultimately be entitled to the abstract. The porary property of the purchaser in the abstract was cient to enable him to maintain the action (*g*).

he seller is bound to produce the deeds, in order that abstract may be examined with them, although they not in his possession, and the purchaser is not to be

See 2 Taunt. 276, *per* Mans- C. J.

2 Taunt. 278, *per* Cham- J.

2 Taunt. 277, *per* Law- rence, J.

(*f*) See and consider 2 Taunt. 270, *per* Mansfield, C. J.

(*g*) Roberts v. Wyatt, 2 Taunt. 268.

entitled

entitled to the custody of them. But, if they are in the possession of a third person, the purchaser's solicitor, it seems, must send to the place where the deeds are, in order to examine them with the abstract, and the seller must pay the expense of the journey (*h*), (I).

The strict rule seems to be, that the vendor must procure the fee to be vested either in himself, or a trustee for him; and that a purchaser is not compellable to bear the expense of a long conveyance, on account of the legal estate having been outstanding for a length of time, or of the estate being subject to incumbrances which are to be paid off (*i*). It is not, however, very usual to insist upon this, unless the title cannot be perfected without a private act of parliament; in which case, the expense of obtaining it is always borne by the vendor.

Unless there be an express stipulation to the contrary, the expense of the conveyance falls on the purchaser (*k*); who, as we have already seen, must in that case prepare and tender the conveyance (*l*). The expense attending

(*h*) Sharp *v.* Page, Rolls, 1815, MS.

(*i*) See 1 H. Blackst. 280.

(*k*) See 2 Ves. jun. 155; and *note*, this is the universal practice of the profession.

(*l*) *Supra*, ch. 4.

(I) Sale by assignees of a bankrupt. A settlement of 1763 was in the possession of a former purchaser, and there was only a covenant to produce a copy of it. A bill was filed by the assignees for a specific performance. The purchaser was informed that the settlement was in the possession of a gentleman in the country, *and might be seen there.* He was ready to covenant to produce it. The purchaser submitted to the Master that it was the duty of the sellers to produce the deeds stated in the abstract before the Master, or to the purchaser's solicitor in London. The Master stated, that he would make inquiry of conveyancers, what the practice in such cases was, and afterwards decided, that the purchaser's solicitor ought to send to Baldock, where the deeds were, to compare the abstract with the settlement, but that the sellers ought to pay the expenses of such journey.

the

ion of the conveyance is, however, always borne ndor.

state be copyhold, the purchaser must bear the oth of the surrender to him and of his admis- and a vendor is not obliged to pay the fine due *mission* of the vendee, although he covenant to and assure the copyholds at his own costs and); because, it is said, the title is perfected by tance, and the fine is not due till after (*o*).

ft be altered by either party, although the altera- ch as would be supported by the Courts, yet the ltered should not be ingrossed without a com- n being first made to the other party (*p*).

haser has a right to require the vendor himself to the estate, if copyhold, and to execute the con- if freehold; and he cannot be compelled to ac- r a surrender, or conveyance, under a power y, unless an actual necessity appears for it (*q*); s to multiply his proofs, and he may be put under s by these means; the letter of attorney may be the party is obliged to prove the execution of

y v. Man, 1 Atk. 95, dition.
am v. Sime, 1 East,
n v. Hammond, 4 Co. ; v. Lord of the Manor , 2 Term Rep. 484; she v. Rogers, 1 Ro. (A.) pl. 1; 3 Burr. Cust. p. 163; Wood's 7; Gilb. Ten. 205; 1 yh. 286; *sed qu.* and v. Hammond, Cro. Mo. 622. pl. 851; and supp. to Co. Copy. s. 10; and Parkins v. Titus, MS. In the first edition, the author cited Willowes's case, 13 Rep. 1, as subversive of the authority of Dalton v. Hammond, as reported in Coke; but upon further consideration, he is satisfied that he was wrong.

(*p*) See Staines v. Morris, 1 Ves. and Bea. 15.

(*q*) Mitchel v. Neale, 2 Ves. 679; Richards v. Barton, 1 Esp. Ca. 268; and see *ibid.* 115.

it (*r*). A letter of attorney may be revoked the next moment, that revocation may be notified to the attorney without the purchaser's knowledge, and then the conveyance would be void; and the purchaser's only remedy would be a suit in equity (*s*).

Besides, the vendor may be dead at the time the power is exercised, and in that case the execution would be void, as a power of this nature expires by the death of the principal (*t*). For this reason, where a purchaser chooses to permit the conveyance to be executed by attorney, the attorney should execute a declaration of trust, that he will stand possessed of the purchase money in trust for the purchaser, until it either appear by satisfactory evidence, that the vendor was alive at the time of the execution of the deed, or if he shall be dead, until the estate is duly conveyed to the purchaser.

As a purchaser cannot be required to take a conveyance executed by attorney, so, on the other hand, if a vendor only covenant to surrender or convey lands to a purchaser upon request, he is not compellable to appoint an attorney for that purpose (*u*).

Where the estate lies in a register county, the conveyance should be registered as soon as it is executed. Mr. Hilliard remarks (*x*) that, by the statutes for registry, there is no time limited for registering deeds; and that it is therefore obvious from an inspection of the acts, how necessary it is, *that deeds should be registered immediately on*

(*r*) See Johnson *v.* Mason, 1 Esp. Ca. 89.

(*s*) *Per* Lord Hardwicke, in *casu* Mitchell *v.* Neale, *ubi sup.* As to the revocation of a power of attorney, see Walsh *v.* Whitcomb, 2 Esp. Ca. 565.

(*t*) Shipman *v.* Thompson, Wynne *v.* Thomas, Willes, 105. 565; Wallace *v.* Cooke, 5 Esp. Ca. 117.

(*u*) Symms *v.* Lady Smith, Cro. Car. 299; Godb. 445.

(*x*) N. (2) to Shep. Touch. 116.

their

cing executed: to enforce this the more strongly, he it may not be useless to consider, if a subsequent 'ance or mortgage should be executed for a valuable eration, and from an almost momentary inattention y of the first vendee, or mortgagee, in not imme- registering, the second vendee or mortgagee should r first; whether, in such case, the first vendee or gee doth not thereby become in a worse situation e would have been by law, in case the registering d not been made.

s very clear, that in the case put, the subsequent ser or mortgagee, unless he had notice, would pre- 'er the first vendee or mortgagee. And it must be ted, that, by delaying to register his conveyance, a ser gives a prior incumbrancer, who may have ted to register his incumbrance, an opportunity of ing his error, and thereby establishing his demand estate; for the acts only say that deeds shall be *nless* such memorial thereof is registered, as by the directed, *before the registering the memorial under the subsequent purchaser claims* (*y*).

ppears, therefore, that there are two cogent reasons memorial of the conveyance should be duly re- d *immediately* after the execution of the conveyance; e, that a prior incumbrancer might, during the de- gister his incumbrance; the other, that the delay give an unprincipled vendor an opportunity of the estate to a *bonâ fide* vendee without notice; if he registered his deeds before the registry of the nveyance, would certainly prevail against the first ser.

(*y*) *Vide infra* in this chapter, and chapter 16.

SECTION II.

Of Assignments of Terms.

A PURCHASER may require an assignment of all outstanding terms, of which he could avail himself in ejectment, to attend the inheritance; and if the purchaser leave them outstanding, he may not, perhaps, have the full enjoyment of his estate, without, at some future period, being himself at the expense of getting them in: for even a mortgagee would be very unwilling to advance money on the estate, unless the terms were assigned, lest a subsequent mortgagee or purchaser, without notice, should obtain an assignment of them, and so over-reach the prior mortgage.

I. The position that a purchaser may require an assignment of all outstanding terms, *of which he can avail himself in ejectment*, to attend the inheritance, naturally calls our attention to the cases in which a term may be used upon an ejectment. We have already seen that, in some cases, the possession of the *cestui que trust* may operate as a bar to his trustee (*z*). So where a purchaser is not, at the time of his contract, aware of the term, and its existence would endanger or affect his title, a fine levied, with five years nonclaim, will operate as a bar to the trustee of the term (*a*); although, where the term is assigned in trust for the purchaser, a fine levied will not affect it, because such a construction would be manifestly contrary

(*z*) *Supra*, p. 337.

(*a*) Iseham *v.* Morrice, Cro. Car. 109, 5th resol.; 2 Ventr. 329.

to

to the intention of the parties (*b*). But as the law on these points is not well settled, it may be laid down as a general rule, that nearly all terms for years, however ancient, and notwithstanding any adverse possession or fines, may be required by a purchaser to be assigned to attend the inheritance; and where a term has once been assigned to attend the inheritance, although at a period very remote, and it has been since treated as a subsisting term by declarations in the subsequent deeds, that the person in whom it is vested shall stand possessed of it in trust to attend the inheritance, a purchaser can never be advised to permit the term to continue outstanding, because it is clear, that it may be used against him upon an ejectment. Nor is it any answer to a purchaser's claim, that the term has already been recently assigned to attend the inheritance.

Where terms for years are raised by settlements, it is usual to introduce a proviso, that they shall cease when the trusts are at an end. In well-drawn deeds, this proviso always expresses three events: 1st, the trusts never arising; 2dly, their becoming unnecessary or incapable of taking effect; or, 3dly, the performance of them. But it frequently happens, in ill-penned instruments, that these events are not accurately expressed, or not all provided for; and in those cases it must be seen whether, in the events which have happened, the term has ceased, for if it has not, the purchaser must require an assignment of the term. To illustrate this doctrine, let us suppose a term for years to be created for raising a sum of money for the first son of *A*, who shall attain twenty-one, and that it is declared by the deed, that when the trusts are performed, the term shall cease. Now, in this case, if *A*

(*b*) Freeman *v.* Barnes, 1 Ventr. 80; 1 Lev. 270. See Smith *v.* Pierce, Carth. 100; Basket *v.* Peirce, 1 Vern. 226.

should not have a son who attains twenty-one, the trusts would not have arisen, and consequently could not be performed; and it seems that the term will not cease; the event which happened not being provided for in the declaration for cesser of the term.

In a late case (*c*), which has already been referred to, it appeared, that under a power Mr. Walsh Porter had, by deed, charged the estate in question with the payment of 5,000*l.* to the children of his then intended marriage, at such time or times, and in such proportions, and in such manner as thereinafter mentioned. And, by the same deed, in further exercise of his power, he appointed the estate to trustees for five hundred years, upon the usual trusts to raise the 5,000*l.* payable to sons at twenty-one, and daughters at twenty-one, or marriage, with the usual provision for raising maintenance in the mean time. And it was provided, that if no child should become entitled to the portions, or if the person or persons to whom the next estate of inheritance of and in the said manor, &c. in reversion or remainder, expectant on the determination of the said term of five hundred years, shall, for the time being, belong, do, and shall, well and truly pay, or cause to be paid, unto the said Edmund Lambert and Thomas Gorman, (the trustees of the term) or the survivor of them, or the executors or administrators of such survivor, or well and sufficiently, to his and their good liking, secure to be paid the portion or portions hereinbefore provided, or intended to be provided, for such child or children, or so much thereof as shall be remaining unpaid (all such maintenance and interest as is hereinbefore mentioned being first raised and satisfied); and in case all and every of the trusts declared as aforesaid, of and concerning the said term, shall in all things be performed and satisfied, or

(*c*) Hays *v.* Bailey, Rolls, 10th August 1813, *vide supra*, p. 303.

shall

be discharged, either by becoming incapable of being rned, or by any other means, and the trustees shall id their expenses, then the term should cease. The ons were paid to the personal representatives of the ring trustee, with all interest and maintenance money the day of payment, by the reversioner, " in order," was declared, " to discharge the estates from the ns, and that the term might cease by virtue of the so contained in the deed of appointment;" and a er release was executed by the trustees of the term receipt of the money. The estate was sold, and rchase completed. The purchaser sold again; and eared, that one of the children was still under age; it was insisted, that the payment to the trustees did ischarge the estate from the portions. The seller a bill for a specific performance. It was argued, he term in the event had ceased; but the late r of the Rolls suggested that, although the term have ceased, yet the portions would still remain ed on the estate under the charge in the deed. It owever, submitted, that the charge, and the term, he trusts of it, must all be taken together. The ns would have been as much a charge on the estate the trusts of the term as they were under the express s. If the term, which was the legal and substantial ty, was gone at law, it was impossible for equity to hat the charge yet subsisted. The very intention of rties would be frustrated by such a decision. The ns were to be paid, according to the charge, to the en in the manner after mentioned; and one mode rds mentioned, was a payment to the children gh the medium of the trustees. The proviso was ed to meet the very case which happened. The es were persons in whom the party making the

charge reposed confidence; and he, the creator of the trust, had expressly provided, that if the reversioner should be desirous to discharge the estate *before the children were capable of receiving the portions* (for, if they were of age, the portions would, of course, be payable to themselves) he might pay the money to the trustees for them, or even secure it to the good liking of the trustees. Equity had no power to say, that this was not a discreet act; and that the portions, although paid to the trustees precisely as directed by the deed, should, for the greater security of the infants, still remain charged on the estates. The term had unquestionably ceased at law; and the portions which it was raised to secure, had, of course, ceased with it. In support of the objection, it was argued, that the portions were not payable by the charge till the children attained twenty-one, and that they could not before that period be paid to the trustees, so as to discharge the estate from them. The late Master of the Rolls said, that he was inclined to be of opinion, that the charge would run with the term which would regulate the mode of payment; but he doubted whether the term would cease, for it was required, that " all such maintenance and interest should be first raised and satisfied." Now maintenance was to be raised till the children attained twenty-one. Then how can it be said that that is done until the child attained twenty-one? That circumstance must concur; all the trusts must be performed; it is in the conjunctive. His Honor doubted therefore whether the charge would cease. Under these circumstances, he should think that the purchaser would not be forced to take the title; and therefore he overruled the exception to the Master's report against the title.

This objection was not considered in the argument. It might, had the point been made, have been insisted, that the

the direction in the deed, that "all such maintenance and interest being first raised and satisfied," must be confined to maintenance and interest up to the time of payment of the principal. The interest was the fruit of the principal; and when the principal was paid, it would yield interest, and that would, of course, be the fund for maintenance. The ground taken against the title makes the reversioner still liable to pay interest under the charge in the deed, although he has paid off the principal, which will produce interest. Could he file a bill against the trustees to pay him the interest of the 5,000*l.* which he paid to them? Could the trustees file a bill against the owner of the estate for payment of the interest, although they had the 5,000 *l.* in the funds? And, if not, does it not follow that the interest was no longer a charge on the estate? The construction, which depends on the general expression in the deed, wholly defeats the intention of the parties, that the reversioner might, at any time, relieve the estate from the charge altogether, upon payment of the portions. The power supposed to be reserved to the owner is, to pay off the principal, and yet leave the estate subject to the interest. The decision, in this case, proves, that the charge of the interest is as serious an objection to the owner's title as the charge of the principal. If, therefore, the payment of the principal has any operation, it is to make the owner pay ten-per-cent. interest instead of five. But, it is admitted, that the portions might be paid to the trustees before the children attained twenty-one. Now, as the maintenance and interest were to be *first* raised and paid, it must necessarily be intended, that the maintenance was such as had already accrued; for, how could the trustees raise by anticipation what might never become due? The proviso for cesser embraced, 1st, the event of there being no child who should become entitled to the portion;

portion; 2d, the payment of the portions to the trustees; 3d, the performance of the trusts. There are some general words in the proviso which are unskilfully introduced; but this was the intention, and the words are sufficient to effectuate it. The word, *and*, introducing the third event, must, it is submitted, be read *or*; for the second and third events could not happen together. The case was afterwards heard upon appeal before the Lord Chancellor, but it had become unnecessary to decide the above point, and his Lordship gave no opinion upon it.

Where a portion is secured by a term of years, and the term is directed to cease upon payment of the money, and the estate is sold before the portion is paid, it sometimes happens that the purchaser is desirous to keep the term on foot, and the following plan has been adopted for that purpose.-- A fictitious mortgage is first made of the term for raising the portion, to a friend of the purchaser's, in which the purchase is not noticed; then the estate is conveyed to the purchaser in the usual way, subject to the mortgage; and then, by a subsequent deed, the supposed mortgagee declares that he has been paid off, and that he will stand possessed of the term in trust for the purchaser, and to attend the inheritance. Now, this plan, although certainly ingenious, is, I fear, ineffectual. It is impossible to read the deeds bearing date, as they necessarily must do, within a day or two of each other, without seeing that the whole proceeding is fictitious; and if the term should be set up in ejectment, it would be quite open to the adverse party to insist that the deeds were nugatory. And when the fact is once established, that the portion was paid off without a *bonâ fide* mortgage, it should seem that the term must cease, by force of the proviso in the deed creating it, and that no artifice of the parties can keep it alive.

II.

II. We may now consider shortly the leading rules on e doctrine of merger of terms of years, without a owledge of which, the practical conveyancer must equently be at a loss to know of what terms to require assignment.

Where a term of years and the inheritance meet in one rson in the same right, the term is extinct.

So a man cannot, Sir Edward Coke says, have a term years in his own right, and a freehold in *auter droit*, consist together (*d*); and he illustrates this rule by ating, that where a man, lessee for years, take a feme sor to wife, the term is extinct. But this position ppears to be contradicted by the case of Lichden *v.* Vinamore (*e*), in which it was held, that if there be lessee r years, reversion for life to *A*, a married woman, and e lessee grant his estate to the husband, and then the ife dies, the term is not extinct, because the husband has the estates in several rights, for the freehold was in the wife, and the husband was merely seised in her right; or, to speak more correctly, the freehold was in the husband and wife, although in her right (*f*).

And it is clear, that if in a case like this, the coalition be not occasioned by the act of the termor, the term will not merge. Thus, the descent of the fee upon the wife of a termor for years after the intermarriage will not drown the term, because the estates do not coalesce by the act of the termor for years (*g*), and the term he holds in his own right, and the freehold in right of his wife. This was decided in the reign of James I. by Fleming, C. J. and Fenner and Croke, justices, against the opinion of Williams,

(*d*) 1 Inst. 338, b. See 9 East, 372.

(*e*) 2 Roll. Rep. 472; 1 Ro. Abr. 934, pl. 10; Ben. 141.

(*f*) See Polyblank *v.* Hawkins, Dougl. 329.

(*g*) Lady Platt *v.* Sleap, Cro. Jac. 275; 1 Bulst. 118; Jenk. 2d Cent. pl. 38.

justice,

justice, who, even after judgment was given, said to the counsel at the bar that, as clear as it was that they were at the bar, so clear it was that the term was extinct; and n other respects expressed himself very violently, so that Sir Edward Coke's doctrine was not overruled without opposition.

Where, however, a husband termor for years, seised of the freehold in right of his wife, has issue by the wife, so that he is entitled, in his own right, as tenant by the curtesy, there seems reason to contend that the term will merge (*h*).

A term vested in a person as executor *may* belong to him beneficially; and it therefore seems, that if he purchase the reversion, the term will be extinct; although it is usual in practice to require an assignment of such a term on a future purchase of the inheritance; and this practice is sanctioned by an *obiter dictum* of Lord C. J. Holt's, in Cage *v.* Acton (*i*), where he admitted (as a point perfectly clear) that if a man hath a term as executor, and purchases the reversion, this is no extinguishment. But in Brooke's Abridgment, it is in three several places (*k*) stated to have been held by the judges Hales and Whorwood, in 4 Edw. VI. that if a man has a lease for years as executor, and afterwards purchases the land in fee, the lease is extinct; and this position is cited and not denied in several cases (*l*), and is adopted by Rolle in his Abridgment (*m*). So in a case in Leonard (*n*), Dyer explicitly laid down the same doctrine; and it has been treated as clear law, in two cases, one of which is reported by Hetly (*o*), and the other by Freeman (*p*). And in one

(*h*) See 1 Bulstr. 118.

(*i*) 1 Salk. 326; Com. 69; and see Webb *v.* Russell, 3 Term Rep. 393.

(*k*) Bro. Abr. Extinguishment 54, Leases 63, Surrender 52.

(*l*) 3 Leo. 111; 2 Rolle's Rep. 472.

(*m*) 1 Ro. Abr. 934, pl. 9.

(*n*) 4 Leo. 37, pl. 102.

(*o*) Het. 36.

(*p*) 1 Freem. 289, pl. 338.

case

of the judges thought, that even the descent of the executor would merge the term (*q*), although of Baron Gilbert justly questions this position (*r*). that a purchase of the fee by the executor shall e term, appears to be founded in reason as well uthority; for, as far as his own interest is con- ere cannot be any reason why the term should e. It is admitted, however, on all hands, that shall not be extinct as to creditors, and this I. ed to believe, from Lord Raymond's report of Acton, is all that Lord Chief Justice Holt , although his *dictum* is so generally stated in and Salkeld's reports of this case. At any rate, *obiter dictum*, and cannot affect a doctrine ap- o well established; and it is therefore submitted der, that in a case of this nature the term must the inheritance, except as to creditors.

nan may have a freehold in his own right, and a *ter droit* (*t*).

re, if a man seised of the freehold intermarry man termor for years, the term is not extinct, sband is possessed of the term in right of his ng the coverture, because he has not done any troy the term, and it is cast upon him by the (*u*).

e lessee grant the term to the wife of the lessor, ; merge (*x*).

a man possessed of a term in right of his wife, the freehold, there seems ground to contend, that will merge, inasmuch as the estates coalesce by

Leo. 112.
ac. Abr. Leases, (R.)
l Raym. 520.
. 338, b.
bridge *v.* Cook, Plo. Comm. 417; and see 4 Leo. 38; Godb. 2; Het. 36.

(*x*) Bracebridge *v.* Cook, Plo. Comm. 417.

his

his own act, and not as in the case of marriage, by the act of law; and accordingly in one case (*y*), Dyer held the wife's term to be extinct by the husband purchasing the fee; and Manwood, C. B. agreed with him; and the same doctrine appears to have been held in a case reported by Moore (*z*). Lord C. J. Hobart, however, seems to have been of opinion, that a purchase by the husband of the fee should not extinguish the term (*a*), and in this opinion Lord C. J. Holt appears to have coincided (*b*).

Upon the foregoing principle, if the lessee make the freeholder his executor, the term will not merge (*c*).

It was formerly holden, that a term for years could not merge in a term for years; but in Hughes *v.* Robotham (*d*), it was determined, that if there be two termors, he who has the less estate may surrender to the other, and the term will merge in the greater: 2dly, that although the reversion be for a less number of years than the term in possession, yet the term in possession shall drown in that in reversion.

It remains to observe, that before the statute of uses (*e*), if a termor for years was enfeoffed to uses, equity would not compel him to execute the estate so as to deprive himself of his term. The statute of Henry, by transferring the use into a possession, would have destroyed the estates of termors who were enfeoffed to uses; but to prevent this injustice, an express saving was introduced into the act of the rights of all persons seised to uses. Therefore, if a fine or feoffment be levied or made to a lessee for years to the use of others, the term will not be extinct, although

(*y*) Godb. 2; 4 Leo. 38.

(*z*) Mo. 54, pl. 157.

(*a*) Young *v.* Radford, Hob. 3.

(*b*) See 1 Salk. 326.

(*c*) 1 Inst. 338, b.; 1 Freem. 289, pl. 338. See Attorney-general *v.* Sands, 3 Cha. Rep. 19.

(*d*) Hughes *v.* Robotham, Cro. Eliz. 302. See Bac. Abr. Leases (S.) s. 2; Stephens *v.* Brydges, V. C. 1821, MS. accordingly.

(*e*) 27 Hen. VIII. c. 10, s. 3.

if

he statute had not been made, the term would have been inguished at common law (*f*). So, where a termor years was made a tenant to the *præcipe*, it was held t although the freehold vested in him drowned the n until the recovery was suffered, yet, when the re-ery was perfected, the term should revive (*g*). And it ms that the same rule must prevail where the convey-e is by lease and release, although it has been strenu-ly argued, that as the lease for a year is a surrender in of the prior term, the subsequent release to uses shall bring the case within the saving of the statute of . There appears, however, to be no weight in this ument; a lease and release being a common convey-e, and deemed one assurance; and from one report of case, in which the question arose, it seems that the ges (*h*) thought that the term was not extinguished by lease for a year (*i*).

It may here be remarked, that a deed purporting to be assignment of an old term may, if that term has by any cident ceased, operate as the creation of a new one. As the common case of an assignment of a term in which freeholder in reversion joins in granting, bargaining, ling, and assigning the term; if the old term has me void, it will be resuscitated by these words (*k*).

III. The expense of the assignment of any terms of years ich a purchaser can require to be assigned to attend the

(*f*) Cheaney's case, Mo. 196, 345; 7 Rep. 19 b, 20 a. cited.

(*g*) Ferrers *v.* Fermor, 2 Roll. 445; Cro. Jac. 643; Terrie's 4 Ventr. 280, cited.

(*h*) See 3 Keb. 310.

(*i*) Fountain *v.* Cook, 1 Mod. 127; best reported Bac. Abr. Leases, (R.); S. C. by the name of How *v.* Stiles, 3 Keb. 283. 309; 2 Lev. 126.

(*k*) See Denn *v.* Kemeys, 9 East, 366.

inheritance,

inheritance, must be borne by the purchaser himself, but the title to them must of course be deduced at the expense of the vendor; and if a term has never been assigned to attend the inheritance, the vendor must bear the expense, not only of deducing the title, but also of the assignment of the term to a trustee of the purchaser's nomination to attend the inheritance.

The rule, that terms of years which have never been assigned to attend the inheritance, must be assigned to a trustee of the purchaser's nomination, *at the vendor's expense*, is not acknowledged by some gentlemen of eminence, who, on the contrary, insist that the purchaser must consider the term either as a protection, or as an incumbrance. If he deem it a protection, then they contend that he must assign it at his own expense. If, on the contrary, the purchaser treat the term as an incumbrance, they admit that the vendor must discharge the estate from it, and accordingly offer to merge the term at his expense. The general practice of the profession, however, is certainly in favour of the purchaser's right to require an assignment of the term to attend the inheritance at the vendor's expense; and when it is admitted that the vendor may be compelled to merge the term at his own expense, it seems very difficult to contend that the purchaser may not insist upon its being assigned. A refusal to assign may, under these circumstances, be thought to be a mere subterfuge to avoid the expense of the assignment, and throw it upon the purchaser. If the purchaser insist upon an assignment of the term, it seems clear that the vendor cannot safely merge it, although the purchaser refuse to bear the expense of the assignment. The title appearing on the abstract is that on which the purchaser is to act, and consequently the vendor, after delivery of the abstract, ought not merely of his own authority to do any act to alter

r or affect the title; and a trustee of a term can
cely be advised, after notice of a contract for sale of
estate, (when he is by construction of equity become a
tee for the purchaser), to merge the term against the
ent of his *cestui que trust*, the purchaser. It would
ifficult, therefore, to establish any other rule than that
ch, it is apprehended, is generally adopted by the
ession.

n some cases, perhaps, assignments of terms may be
ensed with.

n Willoughby *v.* Willoughby (*l*), Lord Hardwick laid
wn, "that where an old term had been assigned upon
xpress trust to attend upon and protect the inheritance,
ettled by such a deed, or the uses of *such a settlement*
cribed or referred to particularly, as it sometimes hap-
s, and the conveyancer is satisfied that those uses of the
eritance have never been barred till his new settle-
t or purchase is made, he may very safely rely upon
because the very assignment carries notice of the old
(l). Nay, where the assignment has been generally
ust to attend the inheritance, and the parties approve
he old trustees, they may safely rely upon it, especially
he cases of a purchase or mortgage, where the title
ds always are or ought to be taken in: for if he has
creation and the assignment of the term in his own
nd, no use can be made of it against him." This,
wever, is never relied upon in practice. And a decla-
on of trust of a term never should be relied upon,
ss all the title deeds are delivered to the purchaser.

(*l*) 1 Term Rep. 763.

) Qu. this. If the person claiming under the settlement should sell
ate to two distinct purchasers, who were equally innocent, it seems
the second purchaser, by procuring an assignment of the term,
exclude the first purchaser during the term.

A mere declaration of trust will not protect the possession against a subsequent purchaser *bonâ fide*, and without notice, who procures an assignment of the term; and it has even been held that the custody of the deeds, accompanied by a declaration of trust of the term, is, as against a bare declaration of trust, tantamount to an actual assignment (*m*). But, as we shall presently see, a case may perhaps occur, in which an assignment of a term would be a protection against a declaration of trust of it, accompanied by the deeds; so that a prudent purchaser will scarcely ever dispense with an actual assignment of an outstanding term.

Mr. Butler, in his learned and practical notes to Co. Litt. lays down the following rules respecting the cases in which a purchaser should or should not dispense with an assignment of outstanding terms (*n*).

" 1st. It may be laid down as a general rule, that wherever a term has been raised for securing the payment of money, as the assignment of it by the trustee for the person entitled to receive, to a trustee for the person obliged to pay the money, is the best possible evidence of the payment of the money; it may be reasonably required as such.

" 2dly. In case a term for years has been assigned to attend the inheritance, if, upon a purchase, *all* the deeds (as well originals as counterparts) by which the term was created or assigned are delivered to the purchaser, and he is satisfied that the trustee in whom it is there said to be vested has made no prior assignment of it, and that the vendor has not charged the estate with any intermediate incumbrance, it is difficult to say what possible use can be made of the term against him, or what good can

(*m*) Stanhope v. Earl Verney, Butler's n. (1) s. 13, to Co. Litt. 290, b.

(*n*) See the 13th section of n. (1) to 1 Inst. 290, b.

be

e answered by requiring an assignment of it to a trustee f his own, unless it be to satisfy the requisitions of those) whom he may afterwards have occasion to mortgage or ell the estate.

" 3dly. But if any of the deeds respecting the term are ot delivered to the purchaser, or if he is not satisfied of ie trustee not having previously assigned it, or of the endor having made no intermediate incumbrance, it seems rudent to require an actual assignment of it to a trustee r him."

With respect to the second of the above rules, the attention of the purchaser should be particularly called to e requisite, that the vendor has not charged the estate ith any intermediate incumbrance. A vendor may, by audulent representations, induce a purchaser to believe at the title deeds are destroyed or mislaid: and if a purchaser acting under this impression should procure an actual assignment of a term from the person in whom it was sted, it seems impossible to contend that the person possession of the deeds, although he claims a prior title the inheritance (*o*), has any equity against the subsequent purchaser, who must not be prevented from making e best use he can of the term. It is evident, however, at the person having thus obtained an assignment of a rm, must have considerable difficulty in using it as a ord to attack the possession of his adversary (*p*).

A purchaser may, in some cases, be entitled to the benefit of an outstanding term, although he has neither an signment of it, nor the possession of the deeds relating it. This doctrine will be discussed hereafter (*q*).

It may here be remarked, that where a term of years

(o) See 1 Pow. Mort. 4th edit. 0; Evans *v.* Bicknell, 6 Ves. 1. 174.

(*p*) See *ex parte* Knott, 11 Ves. jun. 609.

(*q*) See *post*. ch. 17.

does

does not necessarily appear on the face of the conveyance, it should be assigned to attend the inheritance by a separate deed, and no notice should be taken of it in the conveyance of the fee, for the legal estate must prevail at law (*r*); and it is a consequence of this rule, that where a term of years is assigned by the conveyance of the inheritance, or even mentioned in it as a subsisting term, the owner cannot safely bring an ejectment in his own name only, lest his action should be defeated by the production of the conveyance to him, in which it would appear that the legal estate was vested in his trustee. And here we may correct the common error of excepting the term in the conveyance of the inheritance, as an incumbrance, although it is assigned to attend by a separate deed. This practice is very incorrect, for the term is a protection, and not an incumbrance; and the exception in the conveyance effectually defeats the advantages which might otherwise be derived from the term being assigned by a separate deed.

IV. Where trustees ought to convey to the beneficial owner, it will, upon a trial, be left to the jury to presume where such a presumption may reasonably be made, that they have conveyed accordingly, in order to prevent a just title from being defeated by a matter of form (*s*).

But where the trustee of a term is not joined in an eject-

(*r*) See Doe v. Wroot, 5 East, 132; and the cases cited in the note to p. 138; which have overruled Mr. Justice Gundry's, Lord Mansfield's, and Mr. Justice Buller's equitable doctrine as to terms of years. See Doe v. Pegge, 1 T. Rep. 758, n. (*a*), and several cases in Burr. Cowp. and Dougl.

(*s*) Lade v. Holford, Bull. Ni. Pri. 110, as explained in Doe v. Sybourn, 7 Term Rep. 2; and Roe v. Reade, 8 Term Rep. 118; and see Doe v. Staple, 2 Term Rep. 634; Tankard v. Wade, Irish Term Rep. 162; and Hillary v. Waller, 12 Ves. jun. 239.

ment

nt brought by his *cestui que trust*, and the jury state in pecial verdict, or a special case, that the term still con- nes, the plaintiff cannot prevail at law, but will be de- ted by the legal estate in his trustee (*t*). This must vitably happen where a term of years has been assigned attend the inheritance upon a purchase of the fee, and purchaser brings an ejectment in his own name only. were clearly too much to presume a surrender of a term ich the owner has so anxiously kept distinct from the eritance (*u*).

This was so stated in the last edition of this work; the point has since undergone much discussion, and leading heads of the argument, and the present state the law on this head, must now be retraced.

It has long been the policy of our legislature to encou- e the free alienation of real property, and secure the es of *bonâ fide* purchasers. Our statute book abounds h laws having this tendency. The same spirit per- les the common law. We are told that the maxims of common law, which refer to descents, discontinuances, nclaims and collateral warranties, are only the wise s and intentions of the law to protect the possession d strengthen the rights of purchasers. A purchaser is favourite of a court of equity. It is the settled law of at court, that if a man buy an estate fairly he may get a term of years, or other incumbrance, although it is tisfied, and thereby defend his title at law against any ome incumbrance of which he had not notice. It were le to discuss the policy of our law. In a commercial untry like ours, where one great stimulus to enterprise commerce is the hope to possess territorial ownership,

(*t*) Goodtitle v. Jones, 7 Term 2 Term Rep. 684.
ep. 47; Roe v. Reade, 8 Term (*u*) See Doe v. Scott, 11 East,
ep. 118; and see Doe v. Staple, 478.

every one is interested in the free interchange of property, and the safety of purchasers. The danger of latent incumbrances renders it necessary that every possible guard should be thrown around purchasers. The policy of the law in this respect led to the received doctrine as to terms of years attendant on the inheritance. Abstractedly considered, nothing can be more absurd than that a purchaser of the fee should procure a term of years, created a century ago, to be assigned to a trustee for him. But with reference to the protection to be derived from such a term of years, it is of the deepest importance to a purchaser that he should keep it on foot. At law, every term of years in a trustee is *a term in gross*. This, which was distinctly laid down by Lord Hardwicke (*v*), should never be lost sight of. The moment that a court of law acts upon the term as a part of the inheritance, it strikes at the root of the settled doctrines of centuries, shakes the landmarks of the law of real property, and renders insecure the title of every purchaser in the kingdom. Our law permits the creation of terms of years for any period of time. Where a term, whether for one hundred or ten thousand years, is created by way of use, it invests the person to whom it is granted with a legal right to the estate during the period specified. It is not necessary by our law, that possession should accompany the legal estate in order that the title of the legal owner should continue unbarred. Possession by my tenant, or by a person with my permission, or acknowledging my title, is in law possession by me, and during such tenancy or holding my title remains unimpeached; therefore, although the legal owners of the fee of an estate have enjoyed it for the last one hundred years, yet that will not affect the existence of a term of years in the trustee to attend the inheritance,

(*v*) 1 Term Rep. 765.

because

ecause the possession of the legal owner of the fee is he possession of the termor; their titles are consistent, nd support each other. The owner of the fee is as a enant at will to his own trustee. It frequently happens hat the owner of the fee is indebted to the term of years or his peaceable possession; such a possession, therefore, perates as a continual acknowledgment of the legal title f the termor, and proves its efficacy. The term is nxiously assigned to attend the inheritance; it does accordingly attend the inheritance; and the performance f the very service for which it was created never can be ground for defeating its legal operation. Upon principle, therefore, a term of years assigned to attend the nheritance ought not to be presumed to be surrendered nless there has been an enjoyment *inconsistent with the xistence of the term, or some act done in order to disavow he tenure under the termor, and to bar it as a continuing nterest.* This has always been the received opinion of he profession, and particularly of that class of the profession to whom titles are more particularly referred. It matters very little what is the opinion of any individual conveyancer; but the opinion of the conveyancers, as a class, is of the deepest importance to every individual of property in the state. Their settled rule of practice has accordingly, in several instances, been adopted as the law of the land, not out of respect for them, but out of tenderness to the numerous purchasers who have bought estates under their advice.

As judgments, and other incumbrances, are infinite, and it is impossible to rely even upon searches for them, the doctrine, that a term of years attendant on the inheritance should protect a purchaser against incumbrances of which he had not notice, was long since established. This rule of property was shaken in the time of Lord

Mansfield, when the courts of law broke down the boundary between them and courts of equity; but the barrier has since been restored, and equitable doctrines are no longer acted upon in courts of law.

Now, with a view to discuss at large the doctrine of presuming a surrender of a term assigned to attend the inheritance, let us suppose a term of years to be created in the year 1700, by way of mortgage. *B* buys the fee in 1760, and pays off the mortgage, and the term is assigned to a trustee for *B*, his heirs and assigns, and to attend the inheritance. *B* lives till 1819, without disturbing the term, or in any manner recognizing its existence. Can it be contended that a surrender of the term should be presumed? Was not *B*'s possession consistent with the existence of the term immediately after the assignment in 1760? If so, when did it become adverse to it? What necessity was there for any act recognizing the existence of the term whilst *B*'s continued possession was consistent with the term, and was supported by the trust upon which it was assigned? If the term ought to have been recognized from time to time, how often should this act be repeated; once a week, or once a month? Is there any ground upon which, in 1819, a surrender can be presumed on the strength of *B*'s possession, which would not be equally operative the first week, nay, the first day, after the purchase in 1760? In the absence of evidence of a surrender, it is impossible, on any sound principle, to presume one; unless the precise instant can be pointed out when the owner of the inheritance was desirous no longer to have the benefit of the term. Without his presumed concurrence a surrender cannot be presumed; for the trust was not to surrender the term, by which means incumbrances might be let in, but expressly to keep it on foot, in order to exclude them. A surrender by the trustee,

tee, therefore, without the direction of his *cestui que trust*, would be a breach of trust. It is said that the expense of making out a representation to a termor makes the term a burden instead of a benefit to the owner of the fee. It is not, however, denied that the owner of the fee may keep on foot a term attendant on the inheritance, and that no court of law can control his power to do so. Where he has exercised his power, and declared, without any limitation of time, that the term shall be attendant on the *inheritance*, and be in trust for him, his *heirs and assigns*, does not this mean that the inheritance shall be so attended during all the years to come in the term?—and if it do, what power has a court of law, out of a morbid compassion for him, on account of the expense which it may occasion, to presume a surrender of the term which he has so anxiously kept on foot? particularly as at the very moment that a surrender of the term is presumed, its existence may be required to protect the estate against a latent incumbrance; and the Court has no means whatever to ascertain whether there is any such incumbrance. The amount of the expense, too, must depend upon the particular circumstances of each case; and yet it would hardly be desirable that the rule should depend on the quantum of expense which an assignment would occasion. If, however, expense is to be adverted to, on that ground alone surrenders should not in such a case be presumed; because that doctrine would weaken a purchaser's reliance on any given term of years; he would in almost every case search for judgments. This could not be done without expense; and where a man has been in the habit of confessing judgments, it very seldom happens that satisfaction is entered upon them when they are paid off. This leads to great expense, and difficulty in practice; because a purchaser expects the judgments to be regularly discharged;

discharged; and where even a few years have elapsed since the payment of the debt, if the creditor is living and can be traced, yet he hesitates to do any further act in relation to a transaction which he considered long since closed.

If the surrender of the term cannot be presumed at *B*'s death in 1819, we will suppose the estate to descend to *B*'s heir at law. Now no man ever heard of an heir at law executing a deed for the sole purpose of recognizing terms of years attendant on the inheritance, or taking assignments of them to new trustees to attend, where they had already been assigned to trustees of his ancestor's nomination for that purpose. His possession, however, comes in the place of his ancestors; and why should he be deprived of the guard which his ancestor created for his benefit? If his ancestor's possession was the possession of the trustee, it will not be denied that his possession stands in the same relation. The trust is to attend the *inheritance*, and for *B*, his *heirs* and assigns; therefore, under the express words of the trust, the heir is entitled to the benefit of it, and his possession is the possession of the trustee.

Suppose further, that *B*'s heir, in 1820, makes a marriage settlement without noticing the term of years, could the term on that account be presumed to be surrendered? It is *not* the practice upon a marriage settlement to reassign attendant terms to new trustees; and no prudent practitioner declares the trust of attendant terms by the settlement, lest the parties upon an ejectment should be defeated by the production of their own conveyance, upon the face of which it would appear that the legal estate was outstanding; and I never saw or heard of a separate declaration to that effect on a marriage. In short, it is not the practice to advert to terms of years on a marriage settlement.

tlement, or on a devolution from ancestor to heir, hough, no doubt, that may have been done, and with opriety, in some particular cases. It is very rare indeed, t upon a marriage the title is investigated. In ninety-ne cases out of a hundred, the parties take up the title th the settlement, conveyance, or will, under which the sband or wife immediately claims. This is a fact. In ry few instances, and those are upon the marriages of rsons of consequence, is the title investigated; and it has ver been the custom to take a new assignment, or make leclaration of trust of a term before assigned to attend e inheritance. At the time of the settlement, a fraud the husband is not contemplated. No purchaser or rtgagee would accept the title without inquiring for a tlement; and as the wife would, in most cases, be entitled dower if there was no settlement, her concurrence in a e would be required, and that would at once lead to a scovery of the settlement. Neither is it usual to deliver the trustees of a marriage settlement the deeds relating the term. The tenant for life, it is settled, is entitled the custody of the deeds. The trustees have merely e custody of one part of the settlement.

If *B*'s heir was entitled to the benefit of the term in 20, when he made the settlement, can the execution the settlement deprive him of its aid? Is the act consistent with the existence of the term? Was it t declared to attend the *inheritance*, and to be in ust for *B*, his *heirs and assigns?* Suppose the heir, as is ual, to take a life-estate under the settlement, and to be of the old use, can it be contended that this portion of he old use is inconsistent with the title of the trustee, lthough the latter was consistent with the use in fee in he heir? Why should an act be done to recognize the rm? The assignment of the term to attend the *inherit-*

ance

ance speaks at all times, whilst the possession is consistent with the title of the trustee of the term. The universal practice, not to require assignments of attendant term on descents or settlements, proves unequivocally the opinion of the profession that the possession of the heir, and of the persons claiming under the settlement, is in law the possession of the trustee of the term. Length of time in this case is unimportant. If we alter the above dates, and state *B*'s purchase to be in 1800, his death in 1805; and the settlement in 1810, the principle is precisely the same; and it would startle most men to hear, that because the term had not been recognized since its assignment in 1810 a surrender of it may be presumed.

If, however, the term is a subsisting interest after the settlement, let us suppose the life-estate of *B*'s heir under the settlement to be sold immediately afterwards, without the purchaser taking an assignment of the term; does this let in the presumption of the surrender of the term? Now the term, it must be repeated, was assigned to attend the inheritance, and in trust for *B*, his *heirs and assigns*. If the possession of the heir and his family under the settlement was not adverse to the title of the termor, how could the title of the purchaser be so? The term is a benefit, originally assigned as such, and not an incumbrance. A man should at least reject a benefit, or act inconsistently with the intention of the person bestowing it, before he is presumed to repudiate it. The event, if the event is to be looked at upon which this question hinges, shows that he required the protection of the term more than any of the former owners; and if *his* acts are to be adverted to, we shall find him anxiously obtaining a further assignment of the term. For let us further suppose that *B*'s heir, before his settlement, confessed a judgment which was not satisfied, and that the purchaser bought without notice of it, and when he

l discover it, procured an assignment of the term to trustee, and set up the term as a defence against an tion upon the judgment: *Unless the presumption of rrender is an inevitable conclusion from the fact of the ase*, it must be admitted that there is no ground to me a surrender. But can it possibly be laid down as , that every attendant term must be presumed to be dered against a purchaser who does not take an ment of the term, or a declaration of the trust of he time he purchased? Why should he do so whilst session is consistent with the title of the termor, and ely within the limits of the original trust? Would n assignment, a week, or a month, or a year after- , before any adverse claimant appeared, be suf- t to keep the term on foot? If so, when, at what moment, does the presumption arise?

here an easement, for example, is enjoyed, or having enjoyed is discontinued to be used, the user or non- orcibly lets in the presumption of a grant in the one and a surrender in the other. But there the act speaks elf. The whole argument in our case is, *that there ontinued enjoyment under the original trusts, which ce all the persons who have successively enjoyed the* . Therefore, as an enjoyment of the easement would lf, without any further assertion of right or declara- exclude the presumption of a surrender, so here the ued enjoyment must have the same operation.

es then the appearance of the adverse claimant weaken urchaser's case? So far from it, that in the great ity of the cases in the books the protection was not t for until the necessity for it appeared. Equity does gard notice at the time of getting in the term. The no- o operate, must be fixed upon the party at the time of mpletion of the purchase. Equity too will assist a purchaser

purchaser where he has not got an assignment of the term, but has the better title to it. At law, the term is a term in gross, and the courts of law ought not to enter into a consideration of the equities of the parties; because they have not the necessary machinery to enable them to come to a due conclusion on the equitable rights. It has been decided in equity, that if a mortgagor, after a defective mortgage in fee, confess a judgment, the judgment-creditor, although he has the legal title, shall be postponed to the mortgagee (*w*). So it has been held (*x*) that a prior mortgagee, having a subsequent judgment, may tack the judgment to the mortgage; but a prior judgment-creditor getting a subsequent mortgage cannot do so, *because the judgment is not a specific lien upon those lands*, that is, he does not go on the security; he has not trusted to the credit of the estate. A judgment-creditor therefore does not, in equity, stand on the same footing with a purchaser of the estate itself. In a case (*y*) where there was, 1st, an act of bankruptcy by *A*; 2dly, a settlement for valuable consideration by him, without notice to the parties of the act of bankruptcy; and, 3dly, a commission against him; although the commission overreached the settlement, yet the persons claiming under it were held to be entitled to the benefit of an outstanding term created prior to the bankruptcy.

These cases show the rules of equity which flow from the anxiety of the Court to strengthen the title and protect the possession of purchasers; but if at law the outstanding term is to be presumed to be surrendered, they will no longer afford any protection to purchasers.

(*w*) Burgh *v.* Francis, 1 P. Wms. 279, cited.

(*x*) Anon. 2 Ves. 663; Brace *v.* Duch. of Marlborough, 2 P.W. 491.

(*y*) Wilker *v.* Bodington, 2 Vern. 599.

Some

Some stress, in favour of the presumption, has been laid n two circumstances; the one, that the estate has been uietly enjoyed; the other, that the deeds relating to the rm are in the hands of the owner of the estate. The rst circumstance, I have already endeavoured to prove, against the presumption of a surrender. The latter can ever operate in favour of the presumption, unless the ourts of law deny the power of a man to keep an atendant term in a trustee and the deeds in his own possession. In no case does the trustee of the term keep the eeds. They form part of the muniments of title, and are ept as such by the owner of the fee. If it be necessary pon a sale to covenant for their production, by whom ut the owner should the covenant be entered into: nd the covenant should of course be entered into by the erson holding the deeds. The trustee of the term, ven if the deeds were deposited with him, could not e compelled, and would not be advised, to covenant or the production of them. Besides, the case of Doe . Scott, which will be referred to presently, fully nswers that objection. That the judgment-creditor has ot the possession of the deeds, and therefore the surrender, if there be one, is not likely to be in his hands, cannot surely be a ground to presume that there actually is uch a surrender. If the judgment-creditor has the better quity, which is the true inquiry in these cases, he may le a bill against the purchaser, who would be compelled o answer, whether there was a surrender or not.

Suppose that the assignment, when it is taken, is made ot by the original trustee, who is dead, but by his son, who has regularly taken out administration to him, does hat weaken the case? Certainly the administrator could ot know that his father had not surrendered the term in his ife-time; but he was more likely to know the fact than ny other person. For the family solicitor would of course peruse

peruse the deed on his behalf; and if a surrender had been made of the term, which probably would have passed through his office, he would not have suffered the son, as administrator, to execute an assignment of it. Besides, if some deed is, in the absence of all evidence of its actual execution, to be presumed, why should not a new assignment to attend be presumed, if that were necessary to support the purchaser's title, rather than a surrender, which would operate to defeat it. For his possession was consistent with the term, and he trusted his money on the security of the estate itself, which the judgment-creditor did not.

Fifteen years ago, it was very much the practice to leave terms already assigned to attend the inheritance, in the original trustees, and to be satified with a general declaration of trust of all attendant terms. It never occurred to the highly respectable persons by whom that practice was adopted that a surrender of the terms could be presumed. It were difficult to contend that a mere general declaration is sufficient to keep the term alive, if without it the presumption of its surrender would be let in. The trustee of the term, by force of the original trust, becomes, without any further declaration, a trustee for the purchaser. Now if the trust be a trust for the purchaser, and the latter do no act amounting to a disclaimer of the benefit of the trust, how can it vary his rights, that he neglected to re-declare that which has already been expressly declared, viz. that the trustee should hold the term for the original owner, his heirs and assigns, and to attend the inheritance?

Lord Hardwicke, in Willoughby *v.* Willoughby, enters very fully into this doctrine. He admitted, that where an old term has been assigned upon an express trust to attend the inheritance as settled by such a deed, and the conveyancer is satisfied that the uses of the inheritance have

have never been barred till the new purchase or settlement is made, he may very safely rely upon it, because the very assignment carries notice of the old uses. Nay, where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may entirely rely upon it, especially in the case of a purchase, where the title deeds always are or ought to be taken in; for if he has the creation and the assignment of the term in his own hands, no use can be made of it against him (z). Lord Hardwicke thus states cases in which terms may be safely left in the original trustee; but it never occurred to him that the circumstance of so leaving them would let in the presumption that they were surrendered.

It is said that this doctrine withdraws a large portion of the real property in the kingdom from the jurisdiction of the courts of common law. That, however, is not so; because the title of the termor is the legal one, and therefore those courts, in such cases, decide upon the legal title, which only is within their province. The term is set up, not in bar of the jurisdiction over the property, but in consequence of the rule of the court itself, which forbids an equitable tenant to recover against the legal title. If even the doctrine had the supposed operation, that would depend upon the law of the land, and if it required alteration should be altered by the legislature. But the courts of law have been so anxious to support attendant terms, that it has been settled ever since the reign of Charles II. that such a term shall not be barred, even by a fine levied by the owner of the fee, against the intention of the conusor; because such an owner of the inheritance must be taken as tenant at will to his

(z) 1 Term Rep. 772.

trustee, and then his possession is the possession of the trustee (*a*).

Mr. Justice Buller observed, in Doe *v.* Pegge (*b*), that so long ago as the time of Justice Gundry, when an outstanding satisfied term was offered as a bar to the plaintiff's recovery, that Judge refused to admit it, saying that there was no use in taking an outstanding term but for the sake of the conveyancer's pocket; since which time, Mr. Justice Buller added, it has been the uniform practice, that if the plaintiff be entitled to the beneficial interest, he shall recover possession. It does not appear in what case Mr. Justice Gundry made this sweeping observation. It is, however, not law at this day, and indeed never was to the extent in which it was laid down; and Mr. Justice Buller lived to see the law on this subject restored, and his own opinions overruled (*c*). In the same case of Doe and Pegge, Lord Mansfield observed, *that trusts are a mode of conveyance peculiar to this country.* In all other countries the person entitled has the right and possession to himself; but in England estates are vested in trustees, on whose death it becomes difficult to find out their representatives, and the owner cannot get a complete title. If it were necessary to take assignments of satisfied terms, terrible inconveniences would ensue, from the representatives of the trustees not being to be found. Sir Edward Northey's clerk was trustee of near half of the great estates in the kingdom. On his death it was not known who was his heir or relative. So that, where a trust-term is a mere matter of form, and the deeds mere muniments of another's estate, it shall not be set up

(*a*) 1 Ventr. 82; 2 Ventr. 329; 1 Sid. 460.

(*b*) 1 Term Rep. 760, n.

(*c*) See Doe *v.* Staple, 2 Term Rep. 684.

against

against the real owner. It must excite surprise, that Lord Mansfield should have imagined that any rule, whose tendency it was to subvert what was peculiar to this country could long subsist while the peculiarity itself was allowed to exist. As well might you admit the rule which excludes the half blood, and yet, in the face of contrary evidence, presume that a brother of the half blood proceeded from the same couple of ancestors as the person last seised. Is the whole system of trusts to be subverted because sometimes an obscure trustee dies without relations? Or is the legal estate to subsist, or not, according to the expense which a re-conveyance may occasion in any given case? This doctrine never could stand the test of an accurate investigation, and has long since been overruled. They who have best understood the doctrines of equity, have powerfully deprecated their adoption by courts of law.

In Goodtitle *v.* Morgan (*d*), a mortgage for nine hundred and ninety-nine years was made in 1761, by Jones, the owner of the fee. In 1767, Jones made a mortgage in fee to Morgan; and in July 1769, he made a mortgage in fee to another person. In 1768, the nine hundred and ninety-nine years term was assigned to a trustee for Jones, and to attend the inheritance. The first mortgage in fee was before that assignment, and the last after it. In December 1769, he made a mortgage in fee to Sprigg, and the term of nine hundred and ninety-nine years was assigned to a trustee for Sprigg, and he was allowed to recover in ejectment, on the demise of his trustee, against the two prior mortgagees in fee; although it was speciously argued, that if, previous to the conveyance in 1769 to Sprigg, the defendants had brought ejectments upon their mortgages, neither Jones nor his trustee could have set

(*d*) 1 Term Rep. 755.

up this term as a bar to their ejectment; and that, if Jones himself could not set up the term, it seems to be absurd to say that those who claim under him can, for they cannot claim a greater estate than he had. But this argument did not prevail, although Mr. Justice Buller did not put the decision on the right grounds. The case is an authority for my position. It decides clearly that a surrender of the term cannot be presumed on the ground that the first mortgagee did not take an assignment or a declaration of trust of it. A second mortgagee, therefore, procuring an assignment of the term, must prevail at law, and also in equity, unless he had notice at the time he advanced his money of the first mortgage.

In Doe *v.* Staple (*e*), Lord Kenyon, C. J. said, that he extremely approved of what was said by Lord Mansfield in the case of Lade *v.* Holford, that he would not suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but would direct a jury to presume a surrender. He added, "I much approve of that; and where a surrender is presumed, there is an end of the legal title created by the term."

In Doe *v.* Sybourn (*f*), the same learned Judge said, that in all cases *where trustees ought to convey to the beneficial owner*, he would leave it to the jury to presume *where such a presumption might reasonably be made*; that they had conveyed accordingly, *in order to prevent a just title from being defeated by a mere matter of form* (*g*).

Now these rules, it will be observed, are not in favour of presuming a surrender of a term expressly assigned to attend the inheritance against a purchaser. The doctrine

(*e*) 2 Term Rep. 696.
(*f*) 7 Term Rep. 2.
(*g*) And see Goodtitle *v.* Jones, 7 Term Rep. 47; Roe *v.* Reade, 8 Term Rep. 118.

that

that a mortgagor shall not set up an attendant term against a mortgagee does not warrant the presumption of a surrender in this case. In the former case, there are only the rights of the mortgagor and mortgagee still in question, and the presumption is made in favour of the mortgagee. The claim of a third person does not intervene. But does it follow that a surrender should be presumed, not as between the mortgagor and mortgagee, but as between two innocent mortgagees, both claiming under the same mortgagor, where one, after the execution of both of the mortgages, has obtained an assignment of the term? Why is he to be deprived of the benefit of his diligence? Why is this plank in the shipwreck to be taken from him? The doctrine can with much less propriety be applied where the person who has obtained an assignment of the term is an actual purchaser of the estate, whilst the person whom he seeks to exclude by the term is a mere judgment-creditor, having only a general lien over all the seller's property, and who perhaps suffered the judgment to remain dormant many years. The objection is not, that a surrender cannot be presumed against *an owner of the inheritance*, but that the presumption ought not to be made against a *purchaser* of the inheritance, where the contest is between him and incumbrancers claiming under the *seller*, but of whose claims he had not notice. Even the case of Goodtitle *v.* Morgan, in the decision of which Mr. Justice Buller concurred, proves that the mere circumstance of executing mortgages without assigning the term, does not let in the presumption of a surrender against a subsequent mortgagee who takes an assignment of the term. Upon principle, it seems impossible to contend that the circumstance of the last mortgagee not procuring the assignment at the very moment

he advances the money can let in the presumption of a surrender.

The rule, that where trustees ought to convey to the beneficial owner a jury may presume such a conveyance, in order to prevent a just title from being defeated by a mere matter of form, is not denied to be a wise one; but it does not apply to the case under discussion; for in this case the trustees ought *not* to surrender the term; to do so would be to commit a breach of trust; and the presumption, if it is made, has not the merit of preventing a just title from being defeated by a mere matter of form, but lets in one title to the destruction of another, *where the equities are at least equal*; for if the subsequent purchaser has not *equal equity* with the prior incumbrancer equity itself will deprive him of the protection of the legal term, although beyond dispute an existing one.

The case of Keene *v.* Deardon (*h*), proves, that possession, where it is consistent with the title of a trustee, cannot be deemed adverse to it; and that no presumption of a surrender shall be made contrary to an express trust. This proves both the propositions in the case under discussion. Possession is certainly evidence of title, but it is not evidence of the quality of the title. It does not prove whether you are seised in fee, or have a mere chattel interest; nor does it prove whether your title is legal or equitable. And therefore possession may always be shown to be consistent with the title of a trustee of an attendant term. After an express trust to attend the inheritance, a surrender of the term should never be presumed where the rights of the *cestui que trust* are not invaded by the trustee, and the *cestui que trust* has done no act to disavow his right to the trust of the term.

(*h*) 8 East, 248.

The

The case of Doe *v.* Scott (*i*), is a strong authority against the doctrine of presumption. In 1727, Lord Oxford executed a mortgage for a term of one thousand years. In 1751, Lord Oxford executed a marriage settlement, wherein it was stated, that 27,000*l.* part of the lady's fortune, was to be applied to the discharge of the mortgage. Since that time no mention was made of it, nor was there any other evidence of its existence, till, in a mortgage-deed of the 3d of December 1802, this term, together with another outstanding term of 1709, was assigned to secure the mortgage-money. It was insisted that a surrender of the term ought to be presumed, on two grounds: 1st, the recital in the deed of 1751, that there was an adequate sum to be applied in discharge of the mortgage, and no evidence of the term's having been acted upon or recognized from that period until 1802, when it was assigned as an outstanding term; and, 2dly, the possession of the deed itself by Lord Oxford, the owner of the inheritance, which could not have happened unless the mortgage had been paid off. The learned Judge who tried the cause held, that although no notice had been taken of the term from 1751 till 1802, yet the owner of the inheritance having then joined with the representatives of the termors in executing a deed, in which it was recited that the term had not been surrendered, he thought that a surrender could not be presumed. The Court of King's Bench were of the same opinion. Lord Ellenborough, C. J. said, that there was no purpose of justice to be answered by presuming a surrender in this case; nor was it for the interest of the owner of the inheritance to have it assigned to a trustee to attend the inheritance.

Now this case went much further than it is necessary

(*i*) 11 East, 478.

to push the doctrine in the case under discussion. In 1751, a sum was appropriated to discharge the incumbrance; and as the deeds were in Lord Oxford's possession, the mortgage must have been paid off. The term had not been assigned to attend the inheritance, and therefore, for fifty-one years, the period between 1751 and 1802, the term was *an incumbrance*, and not a benefit; and yet the assignment of 1802 was held to be evidence against a surrender. Why was it stronger evidence than the assignment of the term in trust for the purchaser in our case? There, too, the term had been assigned to attend the inheritance, and therefore the possession was consistent with the express trust of the term; whereas in Lord Oxford's case the freeholder's possession was only consistent with the legal title in the mortgagee, under the *equitable* rule, that the mortgagee, when paid off, became a trustee for the owner of the inheritance. It is said, however, that there it was for the benefit of the owner that the term should be kept on foot. What circumstance in the supposed case required that the term should be presumed to be surrendered? Was not the purchaser the owner of the estate? And was it not for his benefit that the term should be deemed a subsisting interest?

Lord Eldon's opinion does not accord with the doctrine of presuming surrenders of attendant terms. In Evans v. Bicknell (*k*), which was decided in 1801, that learned Judge observed, that it seemed to him rather surprising, if he might presume to say so, that Lord Mansfield, who concurred with Mr. Justice Buller in a great many of these equitable principles in a court of law, should not have attended to these distinctions, which perhaps will be found in the very principles upon which the Court of Chancery exists. Titles to property may possibly be found to be

(*k*) 6 Ves. jun. 184.

very

ry considerably shaken by the doctrine of the Court of ing's Bench as to satisfied terms. The law as to that re is, that a second mortgagee having no notice of the st mortgage, if he can get in a satisfied term, would do at which is the true ground of the decision, though it is t put upon that by Mr. Justice Buller; he would, as in science he might, get the legal estate, and by virtue of at protect his estate against the first mortgagee, having t a prior title, the conscience being equal between the rties. When once it is said at law that a satisfied term ould not be set up in ejectment, the whole security of that le is destroyed; and therefore, even with the modern rrection that doctrine has received in the late cases, hich is, that you may set up the term, though satisfied, d put it as a question to the jury, whether an assignment to be presumed, it seemed to his lordship very danger- s between purchasers; and the leaning of the Court ght to be that it was not assigned: and he fully con- rred with Lord Kenyon, *that it is not fit for a judge to ll a jury they are to presume a term assigned because it is tisfied; but there ought to be some dealing upon it*, or you ke from a purchaser the effects of his diligence in hav- g got in the legal estate, to the benefit of which he is ntitled. Then suppose the law takes upon itself to decide e question between purchasers upon this subject, can it cide upon the same rules as courts of equity, as upon e question of notice? It will be said upon this doctrine court of equity does inquire into this; and it is a rule property in equity, and therefore ought to be a rule of operty at law. But how has it become a rule of pro- rty in equity? In equity, the first mortgagee may ask e second whether he had notice. If that defendant posi- ively denies notice, and one witness only is produced the fact of notice, if the denial is as positive as the assertion,

assertion, and there is nothing more in the case, a court of equity will not take the benefit of the term from the second mortgagee, placing as much reliance on the conscience of the defendant as on the testimony of a single witness, without some circumstances attaching a superior degree of credit to the latter. It is impossible, therefore, that the rule of property can be said to be the same as at law; and if it stands upon different principles, in fact, it is perfectly different.

In Maundrell *v.* Maundrell (*l*), which was decided in 1804, the question arose, whether a purchaser could protect himself against dower by a prior term of years, unless it was actually assigned to a trustee for him; and the Lord Chancellor ultimately decided that he could not; because such had been considered the general rule; but his Lordship, upon principle, thought that the purchaser would, as in other cases, be entitled to the benefit of the term without an actual assignment. He said that he doubted whether it was possible, upon principle, to say the assignment of a term that has been once assigned to attend the inheritance, is necessary from time to time whenever that inheritance is made the subject of purchase (*m*).

The opinion of the Lord Chancellor therefore is that an assignment of the term is not necessary upon every new purchase; and this is a powerful authority against the presumption of a surrender, on the mere ground that the term has been left undisturbed. Maundrell *v.* Maundrell is not an authority requiring an assignment in every case upon every new purchase; but whilst it establishes the necessity of an actual assignment, in order to bar dower, is a grave authority for the continued existence of the term in other cases, although it is left in the name of the original trustee.

(*l*) 10 Ves. jun. 246. (*m*) 10 Ves. jun. 259; and see p. 386.

In

In the late case of Doe on the demise of Burdett *v.* right, B. R. T. T. 1819, a term assigned in 1735, to se an annuity, and subject thereto to attend the inhe- ance, was presumed to be surrendered. No act had en done to acknowledge the term, except that, upon a e in 1801 of a small part of the estate, for redeeming land-tax, the owner had covenanted to produce to the rchaser the deeds creating and assigning the term. ere, however, the ejectment was by a person claiming heir, against a person who claimed also as heir (*n*).

But in the cases of Doe *v.* Hilder, and Doe *v.* Stace, . R. (*o*), (I), which were decided afterwards in the same m, it appeared that the ejectment was brought by a dgment-creditor, who had issued an elegit against ichard Newman. In 1762 a regular mortgage-term of one

(*n*) MS. S. C. 2 Barn. & Ald. 782.

(*o*) MS. S. C. 2 Barn. & Ald.

(I) Another question of great importance arose in these causes, which became unnecessary to decide, viz. whether the statute of frauds ded a judgment-creditor, under an elegit, to take the term in execu- n. The statute, it is decided, did not intend to place the right of the ditor on the same footing against an equitable as against a legal estate; d it does not enable him to take in execution an equity of redemption, a trust in a leasehold. Now every attendant term is at law a chattel al—a term in gross, and therefore cannot be taken in execution for the bt of the *cestui que trust*. The legislature never intended to reduce a mple estate with an attendant term to a level with a chattel in- st, and to give the right of execution as if it were a chattel interest, ere, under the same circumstances, a mere chattel interest would not within the statute. The act in all its provisions is inaccurately framed, l it is not desirable that another new construction should at this day be en to it. A term outstanding has always been considered to protect ainst judgments; but if the construction above alluded to were to ail, it would be necessary to search for judgments in every case, in er to ascertain whether any writ of execution had issued, or rather the n would be no protection, because it could not be discovered whether rit had issued.

thousand

thousand years was created by Francis Hare Naylor, the owner of the fee, and several other charges were made previously to and in the year 1770. In 1771, Naylor devised the estate to trustees, to sell. In 1779, they sold, and conveyed to John Newman in fee, and the one thousand years term was, in consideration of the payment of the mortgage-money, assigned by a separate deed (7th October, 1779) to a Mr. Denman, his executors, administrators and assigns, " in trust for the said John Newman, *his heirs and assigns*, and to be assigned, conveyed, and disposed of, as he or they should direct and appoint. *And in the mean time, and until such appointment*, to attend and wait upon *the freehold and inheritance of the same premises*," to protect the same against mesne incumbrances. In October 1790, John Newman died intestate, leaving Richard his brother and heir. In November 1797, Richard died, leaving Richard, his son, his heir, then a minor. On 23d August 1808, the last-named Richard gave a warrant of attorney to the lessor of the plaintiff to enter up judgment for 4,000*l.* which was immediately done. In 1810, Mr. Denman, the trustee of the term, died intestate, leaving John Denman, his son and next of kin. In October 1814, Richard Newman, on his marrige, settled the estate to the use of himself for life, with remainder over in strict settlement. In June 1816, he sold and conveyed his life-estate to his mother, and she devised the estates to the persons under whom the defendant claimed as tenant. In 1817, the lessor of the plaintiff issued an elegit, without having revived the judgment, and had an inquisition taken thereon, which was set aside for irregularity. In 1818, he revived the judgment by *scire facias*, and issued an elegit; and on 13th March 1818 an inquisition was taken thereon, and then the ejectment was brought. On 17th March 1819 (after the commencement of the ejectment), John Denman,

Denman, as the son and next of kin of Mr. Denman, took out letters of administration to him, and by a deed, dated the 19th of the same month, he, by the direction of the devisees of the purchaser, in the usual and regular way, assigned the term to John Newman, a trustee for them, and to attend the inheritance. *The deed creating the term was produced by the purchaser of the largest part in value of the estate comprised in it. The deed assigning the term to attend on the purchase by Mr. Newman, in* 1779, *and the last deed of assignment, were produced by the defendants.* The learned Judge thought that the question as to a surrender ought to go to a jury. His lordship told them, that it seemed to him, that as the trustee was appointed forty years ago, and had never done any act, but that the party who was beneficially interested had always acted on the property, he (the learned Judge) could not consider an administration taken out but a week before the assignment as at all effective; that he considered to be done merely for the purpose of setting up this old term to defeat the plaintiff; and under such circumstances he should leave it to them to presume it had been surrendered, which according to the learned Judge's report the jury expressly said they did. The Court of King's Bench, after hearing the case argued at considerable length, and taking time to consider, confirmed the learned Judge's direction.

Lord Chief Justice Abbott delivered the following judgment, according to the short-hand writer's note:

"This was an action of ejectment, tried before my brother Park at the last assizes for the county of Sussex. The title of the lessor of the plaintiff was upon a judgment recovered in the year 1808, against Richard Newman, for 8,000*l.* and a writ of elegit and inquisition thereupon in the year 1818, finding Richard Newman seised in fee of the premises in question. It was further proved,

proved, that the defendant occupied the land as a tenant, and had declared that he considered it to belong to Richard Newman, and had delivered to him a notice of a judgment received in June 1818, from the lessor of the plaintiff. On the part of the defendant it was proved, that on the 23d of June 1762, Francis Hare Naylor had conveyed the premises in question, *inter alia*, to Thomas Carter, for a term of one thousand years, by way of mortgage, for securing the sum of 6,000*l.* That in the year 1779, the mortgage was paid off, and deeds were then executed, whereby, in effect, the term was assigned to William Denman, in trust for John Newman, a purchaser of the premises, and to attend the inheritance: That in the month of October 1814, the said Richard Newman, to whom the premises had descended from the purchaser John Newman, made a settlement upon his intended marriage; whereby he conveyed the premises to trustees and their heirs, to the use of himself for life, with a remainder to his intended wife for life, remainder to the issue of the marriage, and reversion to himself in fee: That in the year 1816, the said Richard Newman conveyed his life-estate to Sarah Newman, the mother of Richard, as a security for 1,162*l.* which appears to have been money then due from him to her: That Mrs. Newman, the mother, died in the year 1817, having previously devised her interest to some other relations: That William Denman, to whom the term had been assigned in trust, to attend the inheritance as aforesaid, died about four years ago; and on the 19th of March last, his son took out administration to him, and executed a deed, purporting to be an assignment of the term, to a person therein named, in trust for the devisees of Mrs. Newman, the mother. Upon this evidence, two questions were made at the trial: first, whether the term might be presumed to have been surrendered and merged in

in the inheritance; and if it might not, then, whether it was a trust within the tenth section of the statute of frauds, so as not to stand in the way of the execution on the judgment. The learned Judge thought this a case in which a jury might presume a surrender of the term; and the matter being left to them, they found that the term had been surrendered. A motion was afterwards made for a nonsuit, according to leave given by the learned Judge. A rule to show cause was granted; and the matter was argued before us very fully and ably. The same two points were made; and with respect to the statute of frauds a further point also, it being contended, first, that the trust of a term of years is not within the tenth section of the statute; and, secondly, if it be, yet in this particular case, the statute would not help the plaintiff, because the termor must be considered as a trustee, not for the debtor, but for the devisees of Mrs. Newman, at the time of issuing the execution. Upon these points, however, it is not necessary for us to pronounce any judgment; because we are of opinion, that in this case the surrender of the term might lawfully and reasonably be presumed. It is obvious that if such a surrender had been made, it would not probably be in the power of the plaintiff to produce it, he being a stranger to the particulars of the title which his debtor had in the land. The principal ground of objection to the presumption was, that such a presumption had in no instance hitherto been made against the owner of the inheritance, the former instances being (as it was said) all cases of presumption in favour of such owner. But this proposition appears to be too extensively laid down. One of the instances in which it has been said that a surrender shall be presumed, is the case of a mortgagor setting up a term against his own mortgagee; and this is said generally, and without distinction,

tinction, between a mortgagee in fee or for years. But if such a term be set up against a mortgagee for years, and a surrender presumed, the presumption is made against, and not in favour of, the owner of the inheritance. It is made against his interest at the time of the trial, but in favour of his honesty at the time of the mortgage; for if the term existed at the time of the mortgage, he ought in honesty to have secured the benefit of it to the mortgagee at that time, and not to have reserved it in his own power as an instrument to defeat his mortgage; and upon the same principle on which a surrender is presumed in the case of mortgagor and mortgagee, we think it may reasonably be presumed in the present case; though the principle is applicable not to the judgment-creditor but to other persons. One of the general grounds of a presumption is the existence of a state of things which may most reasonably be accounted for by supposing the matter presumed. Thus, the long enjoyment of a right of way by *A*, to his house or close, over the land of *B*, which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the owner of the land; and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter, a release of it, is presumed. Where a term of years becomes attendant upon the reversion and inheritance, either by operation of law, or by special declaration upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion, thus become the *cestui que trust* of the term, may be accounted for by the union of the two characters of *cestui que trust* and

inheritor, and without supposing any surrender of the
; and therefore, in general, such enjoyment, though
ay be of very long continuance, may possibly fur-
no ground to presume a surrender of the term. But
re acts are done or omitted by the owner of the
ritance, and persons dealing with him as to the land,
h ought not reasonably to be done or omitted, if the
existed in the hands of a trustee, and if there do
appear to be any thing that should prevent a sur-
er from having been made; in such cases the things
or omitted may most reasonably be accounted for
upposing a surrender of the term, and therefore a
nder may be presumed. We think there are such
s in the present case. In the year 1814, Richard
ton, the debtor, and then owner of the inheritance,
a settlement upon his intended marriage, which
place immediately. Upon such an occasion, the
and title-deeds of the husband would probably be
d into by professional men on the part of the hus-
, at least, if not on the part of the wife also; and
thstanding the assertion of one of the learned gen-
en who argued this case on the part of the defendant,
by whom we were informed that it is not usual on
occasions to take any notice of an outstanding
ied term, we cannot forbear thinking that such a
always ought to be, and frequently is, in some way
ed, either by the deed of settlement, or by some
ate instrument; because, if not noticed, and the
or not called upon to assign the term to the uses of
settlement, nor any declaration of trust made of it to
e uses, it may afterward be made an instrument of
ating the settlement. The title-deeds usually remain
the husband, and if he be driven by necessity to
ow money, he may meet with a lender who has no

notice of the settlement, and by handing over his deeds, and obtaining an assignment of the term to him and other conveyances, give to him a title that must prevail both at law and in courts of equity against the settlement. The supposed practice of taking no notice of outstanding terms, on such an occasion, appears to have been insisted upon before Lord Hardwicke, in the case of Willoughby *v.* Willoughby, as applied to marriage settlements and purchases. But that very learned Judge, in giving his judgment in that case, says he had inquired of a very learned and eminent conveyancer, and could not find that there had been any such general rule; and he afterwards proceeds to say, "Where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may safely rely upon it, especially in the case of a purchase or mortgage, where the title-deeds always are, or ought to be, taken in; for if he has the creation and assignment of the term in his own hands, no use can be made of it against him." Such instances as these may account for the practice in many cases, but cannot constitute a general rule. If in the present case it had appeared that the deeds relating to the term were delivered to the trustees of the marriage settlement as one of the securities for the settlement, the case would have stood on a very different ground. The marriage settlement, however, is not the only occasion on which we think it may most reasonably be supposed that this term, if existing, would have been brought forward. It appears that in 1816 the same Richard Newman, being then indebted to his mother, and desirous of giving her security for the debt, prevailed upon his wife to join with him in conveying to her the interest they derived under the settlement. Upon this occasion, an assignment of the term, or a delivery of the deeds relating to it, would

ter right to the one holding the deeds (*p*). As een a purchaser of the estate and a mere judgment-tor, the rule applies with irresistible force. The pur-r, therefore, clearly had *the better equity*; and the mption of the surrender, without any evidence upon h to ground it, let in the judgment-creditor on the e in the hands of the purchaser, although, according uity and good conscience, the creditor had no title nk as such. *The presumption too let in the judgment-tor on the estates provided for the wife and children by arriage settlement; for the term could not be presumed surrendered against the purchaser, and in existence he benefit of the wife and children.* And yet gentle-in very great practice never knew an instance of an dant term being re-assigned on a marriage, and have pd hundreds of settlements to be executed without iring such an assignment; so that the provisions for very many families may be deeply incumbered is new rule is to be followed. It will not be con-d that the subsequent conduct of the purchaser of fe-estate ought to affect the wife and children of the r; and yet it is undeniable that the circumstance of rchaser not taking an assignment of the term was upon as a strong ground in favour of the presump-. The assignment was made by Denman's adminis-r, who was regularly such as next of kin, and not a stranger, procuring a limited administration *de bonis* for the purpose of assigning the term.

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(*p*) Stanhope *v.* Earl Verney, 2 Eden, 81.

(*q*) Doe *v.* Putland.

of priority, or otherwise; in the case of the settlement, for the sake of his intended wife, and the issue that he might expect by her; and in the case of the mortgage, for the ease of the mortgagee, to whom he was so nearly related, and who also was evidently a favoured creditor. And it cannot be denied, that an actual assignment of the term would have been in many respects more operative against the judgment than its mere existence. In the case of the mortgage, it would have put an end to all question upon the statute of frauds, by making the termor specifically a trustee for the mortgagee before execution issued, according to the case of Hunt *v.* Coles, 1 Com. Rep. 226, For these reasons we think the verdict ought not to be disturbed, and the rule must therefore be discharged."

It will at once be observed, that this is a stronger case in favour of the existence of the term than that which we have been considering. There was no circumstance which pointedly called for an assignment of the term before the period when one was made; for an assignment is never made by reason of descents, or of a marriage settlement. Previously to the sale, therefore, the presumption could not on any reasonable ground be let in; and if not, such a presumption ought not to have been made at all. There could be no doubt which ought to be preferred, the purchaser, or the judgment-creditor. The latter obtained his judgment on a warrant of attorney, and slept on his security for ten years, and never had a specific lien on the estate, but a general security riding over the whole of the seller's property; whereas the purchaser not only bought the estate itself without notice of the incumbrance, but had possession of all the deeds relating to the term, to the possession of which he was entitled as a purchaser. That circumstance alone, even as between two mortgagees of the estate itself, both of them equally innocent, would give

the

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(*q*) Doe *v.* Putland.

Mr. Baron Garrow. Upon this ejectment the lessors of the plaintiff proved a mortgage in fee of the estate to Thomas Markwick, in August 1814, by Richard Newman the son, who afterwards made the marriage settlement. By this mortgage, which it had not been considered necessary to produce upon the former ejectment, all deeds were granted; and it contained a *general* declaration of the trust of all terms of years for the mortgagee. The assignment of the term from Carter of the 7th of October 1779, was delivered over to Markwick, and was contained in a schedule of title-deeds made at the time of the mortgage, and signed by Markwick. By a deed, dated the 9th of September 1819, Newman, the trustee of the one thousand years term, declared that he would stand possessed of it in trust for Markwick, and to secure the mortgage-money due to him. It was argued on the part of the defendant that it would be inconvenient that one judge should direct a jury to presume a surrender of the term, and another direct the contrary. In the mortgage to Markwick there was no notice of any particular term, and no assignment was taken of the one thousand years term; Newman might therefore have parted with the term upon a new loan. The assignment in March 1819 was not at all for the benefit of Markwick; there was no acting upon the term from 1779 till 1819. No notice was taken of it in the marriage settlement. The learned Judge said, in charging the jury, that the facts were very different now to those proved on the former trial; and his present view was sanctioned by the suggestion in that very case. Here the deeds were handed over to the mortgagee before the settlement and conveyance, which accounts for the term not having been mentioned in those securities. The circumstance of the deed having been scheduled and handed over to Markwick shows that the term had not been surrendered. The

learned

learned Judge directed the jury to find a verdict for the plaintiff. The jury found that the term was subsisting, and reserved any question of law.

In Trinity term 1820 the defendant moved for a new trial; the learned Judge who tried the cause re-stated the point, upon which he directed the jury, and observed that the case had excited a great deal of attention, and had occasioned the observations which have already been submitted to the learned reader (*r*). The Chief Baron said, that he should like to have the point argued on the presumption of surrender. From his habits in Westminster Hall, his lordship added, he had travelled more than most men through the law relating to this case, and he did not think the doctrine of presumption a correct doctrine. It is a very serious point; and of late the doctrine has been carried to a very frightful extent. Mr. Baron Graham observed, that he had never suffered these presumptions, except in cases very strongly warranted, and where nothing was shown to the contrary. The Chief Baron added, that he never desired a jury to presume where he did not believe himself. The Court gave the defendant leave to argue the point upon the statute of frauds, upon a case to be stated (*s*). The point, therefore, as to the surrender of the term, was put at rest. The case upon the other point was prepared, but the suit has since been compromised, highly to the advantage of the Newmans.

The attention of the Lord Chancellor was quickly drawn to the doctrine of the Court of King's Bench. In

(*r*) They appeared at the time in the shape of a letter from the author to Mr. Butler.

(*s*) It appears, therefore, that the presumption was made on the first ejectment against the real facts and merits of the case as they ultimately appeared. This powerfully shows that such a presumption ought not to be made on light grounds.

the Marquis of Townsend *v.* Bishop of Norwich, on the 27th January 1820, his lordship observed:—

The legal interest in the advowson is unquestionably in Mr. Ainge, for a term of years, which, as I understand, has been expressly assigned to attend the inheritance. I do not inquire whether there may have been intermediate transactions since the creation of the term, which might induce some people to think a surrender of it should be presumed, further than to remark, that having in days, which perhaps may be thought days of yore, passed about two years, by no means unprofitably, in the office of Mr. Duane, and during which I had frequent opportunities of knowing the opinions entertained by Mr. Booth, Mr. Fearne, and other eminent conveyancers of that day, I well know that they were in the habit of proceeding on notions relative to satisfied terms, which, notwithstanding some modern decisions, I would not advise conveyancers to depart from (*t*).

Upon another occasion his lordship observed: Formerly, assignments were not considered necessary, because the old trustee would be a trustee for you, although you might not like him. It was never considered that the presumption of a surrender was to be made because some particular act had not been done. Lord Kenyon thought that some act must be done to presume a surrender; but now it is said, that if no act is done, you may presume a surrender: I cannot go the length which I see some late cases go, where there is no proviso. They have raised the presumption from a transaction where they say the term would have been assigned if not surrendered. I say that the circumstance does not let in that presumption; because the purchaser must know that the term will be held in trust for him, and he

(*t*) From Mr. Wilson's note.

may

may leave it where it is, to save the expense of taking out administration (*u*).

His Lordship again took occasion to observe, in Hayes *v.* Bailey, 15th March 1820: There is now a modern doctrine of presuming surrenders. When I first came here, every old lawyer thought assignments of terms unnecessary; and as to the principle, that the term would be presumed to be surrendered if it had not been assigned on marriages, &c.; it was then thought that there was no occasion to assign, for if it had once been assigned to attend, the assignee will be a trustee for you. They then never thought it necessary to have it assigned on such occasions. I remember Mr. Lloyd used to say, that an old term was worth two inheritances. You see Lord Kenyon got as far as this before he would presume a surrender; you must show that there had been some dealing with it; but it seems to be the law now, that if you show that there has been no dealing with it you are to presume it surrendered (*x*).

In the late case in the Exchequer, of Deardon *v.* Lord Byron, the Chief Baron again expressed his disapprobation of this doctrine of presumption (*y*).

Upon the appeal in the House of Lords, in Cholmondley *v.* Clinton (*z*), the Lord Chancellor, with reference to a deed of the year 1704, by which a term of two hundred years was created, with a proviso for the cesser of the term, but which, as the circumstances upon which that term was to determine had not taken effect, remained a subsisting term, and was assigned in 1811, observed:—'I would wish to call your Lordships most particular attention to this part of the case, because, unless I now misunderstand, and unless I have misunderstood for a

(*u*) From the Author's note.
(*x*) From Mr. Jacob's note.
(*y*) MS.
(*z*) MS.

good

good many years, in which I have been laboriously, in different situations, discharging the duties which belong to the profession of which I have the honour to be a member, the doctrine upon this subject, there arise out of the circumstances which I am about to mention many important observations bearing upon this case, with a great degree of importance, because bearing, unless I misunderstand the case very much, upon the titles to property in this kingdom. My Lords, this deed of 1704 provides, as I before stated, for the cesser of the term, that is, of the interest which the term creates. Let me suppose for a moment, that there had been no such declaration with respect to the cesser of the term, or what comes to the same thing, that the state of things has not yet arisen in which the term is to cease, that term created in 1704, would, according to all the ideas that I ever had of the law of this country (I am speaking now of what would have been done twenty-five years ago, instead of speaking particularly of the present time,) be considered as a term which, whether the instrument that created it or not did so declare, would be attendant upon the inheritance when the ends and trusts of it were satisfied; that is, it would be considered as a term, where neither presumption that it was satisfied, nor presumption that it was surrendered, would at that period have been entertained, unless there had been some dealing with the term which would authorize a presumption either of the one nature or of the other, but it would be taken to be, what, in the language of those who are now no more, I have often heard it stated to be, the best part of a title, namely, that old term that could be got in to protect the inheritance. And I conceive that such a term, whether there was any intention that it should or should not attend the inheritance, would be a term held in trust to attend the inheritance,

protecting

protecting the equities of all who had equities during the existence of that term; all the estates, to a certain extent, that is, during the duration of the term, would be equitable estates, but protecting them all according to the due course, and order, and priority in which they existed, and according to their equities."

In giving judgment in the same case upon the hearing at the Rolls, the present Master of the Rolls appeared also to be of opinion against the presumption in such cases (*a*).

Since the decision in Doe *v.* Hilder the point has been repeatedly debated before the different Masters in Chancery, upon objections taken by sellers to procure representations to terms of years, which, they insisted, ought to be presumed to have been surrendered; but the general and prevailing opinion has been that that doctrine cannot be maintained; and the Masters have acted upon that principle.

And finally, in Aspinall *v.* Kempson, upon a motion before the Lord Chancellor for a new trial, in which some gentleman at the common-law bar cited Doe *v.* Hilder, his Lordship observed, "it is not necessary to consider much the doctrine of presumption with reference to the present case, but the case of Doe *v.* Hilder having been alluded to, and having paid considerable attention to it, I have no hesitation in declaring that I would not have directed a jury to presume a surrender of the term in that case; and for the safety of the titles to the landed estates in this country, I think it right to declare that I do not concur in the doctrine laid down in that case (*b*)."

We may, therefore, be justified in considering the law to stand as it did before the decision in Doe *v.* Hilder; and conveyancers of course will follow the advice of the

(*a*) 2 Jac. and Walk. 158.

(*b*) L. I. Hall, 5 Dec. 1821, from Mr. Walker's note.

Lord

Lord Chancellor, and not depart from the practice which they have hitherto followed.

The Vice-Chancellor has in two late cases upon specific performance, as between a seller and a purchaser, presumed a term to be surrendered which had *not* been assigned to attend the inheritance, and which for a long period had not been disturbed. The first case was Emery *v.* Growcock (*c*), which will I believe be reported. The other case was *ex parte* Holman (*d*), where it appeared, by the abstract of title delivered to the purchaser, that, by indenture bearing date the 24th of December 1735, and made between Thomas Baker of the one part, and John Marsh of the other part, the said Thomas Baker did grant and demise, amongst other hereditaments, the messuage and premises in question unto the said John Marsh, his executors, administrators and assigns, for the term of five hundred years, subject to redemption on payment by the said Thomas Baker, his heirs, executors, administrators and assigns, unto the said John Marsh, his executors, administrators or assigns, of the sum of 205*l.* on a certain day therein mentioned, that the said sum was not paid accordingly, but that the same with all interest was paid to the executor of the said John Marsh on the 6th day of October 1750, as appeared by a receipt indorsed on the said indenture, but no assignment or surrender of the said premises comprised in the said term was ever made and executed, and therefore the purchaser insisted that the sellers should at their own expense discover the personal representatives of the said John Marsh, and procure an assignment from them of the said term to a trustee for the purchaser to attend the inheritance.

The Master to whom the title was referred was of opinion that the term of five hundred years was outstanding,

(*c*) March 1821, MS. (*d*) 24 July 1821. MS.

ing, and was then vested in the personal representative or representatives of John Marsh the termor, but it did not appear by any evidence before him who was or were such personal representative or representatives; and the Master was of opinion that it was expedient and necessary that the said term should be assigned to a trustee for the purchaser, and that the expense of deducing the title thereto, and of procuring the said term to be so assigned, should be borne and paid by the vendors.

In an intermediate deed, dated in July 1749, the term was noticed, but in no other deed was it mentioned; and there were three conveyances of the fee upon sales, one in 1784, another in 1791, and the other in 1792. The Vice-Chancellor was of opinion that a surrender of the term must be presumed.

V. The importance of obtaining an assignment of all outstanding terms cannot be too strongly impressed on purchasers. If a purchaser has no notice, and happens to take a defective conveyance of the inheritance, defective either by reason of some prior conveyance, or of some prior charge or incumbrance, and if he also takes an assignment of the term to a trustee for him, or to himself, where he takes the conveyance of the inheritance to his trustee, in both these cases he shall have the benefit of the term to protect him; that is, he may make use of the legal estate of the term to defend his possession, or, if he has lost the possession, to recover it at common law, notwithstanding that his adversary may at law have the strict title to the inheritance (*e*).

Lord Hardwicke was of opinion that the protection arising from a term of years, assigned to a trustee for a purchaser, should extend generally to all estates, charges

(*e*) Willoughby v. Willoughby, 1 Term Rep. 763, *per* Lord Hardwicke; and see For. 69.

and

and incumbrances, created intermediate between the raising of the term and the purchase (*f*). And this doctrine, unqualified as it is, seems correct. For as the term will prevail over a strict title to the inheritance, it will of course be a protection against judgments, mortgages, and all other incumbrances and estates less than a fee; and it may, in like manner, be used as a shield against an act (*g*) or commission (*h*) of bankruptcy.

In the late case of the King *v.* Smith (*i*), however, the Court of Exchequer held that a term of years would not protect a purchaser against crown debts, although he purchased *bonâ fide* and without notice (I). This point had previously been considered by most of the leading characters in the profession, some of whom have since filled the highest judicial situations; and the general opinion of the profession appears to have been, that a purchaser might protect himself against crown debts, by a legal term of years created previously to the right of the crown attaching on the estates, where he had not notice, express or implied, of the debt due to the crown, or of the vendor being an accountant to the crown. They relied on the analogy between this case and the general rule respecting

(*f*) See 1 Term Rep. 768.
(*g*) Collet *v.* De Gols, For. 65.
(*h*) Hithcox *v.* Sedgwick, 2 Vern. 156, reversed in *Dom. Proc.* See *post.* c. 17, this point considered.
(*i*) Excheq. 2d March, 1804, MS. Appendix, No. 16.

(I) It has been determined that in the case of a purchase for a valuable consideration, without notice and without fraud or covin, from a *simple contract* debtor of the king, the lands are not bound by such simple contract debt. The King *v.* Smith, 1 Wight. 34. In that case, the general words in the statute of 13 Elizabeth, c. 4, received a limited and proper construction. In Wilde *v.* Fort, 4 Taunt. 334, in which it was not necessary to decide the point, the rule was laid down with apparently too much latitude, that every person who has received money belonging to the crown, every accountant of the crown for money of the crown received, falls within the act. See Casberd *v.* Ward, 6 Price, 411.

judgments

judgments and recognizances, against which a purchaser may protect himself by an outstanding legal estate, unless he had notice of them previously to completing his purchase. The late Lord Kenyon, in an opinion on this point, treated the right of the crown as not superior to that of a subject. Indeed, the point may fairly be said to have received what was tantamount to a judicial decision, previously to the determination of the Court of Exchequer. When the late learned Chief Justice of the Common Pleas was Solicitor-general, he gave an opinion in favour of the right of the crown to extend lands in the hands of a mortgagee, although the legal estate had never vested in the mortgagor, but had been conveyed to the mortgagee by the trustees in whom it had been vested in trust for the mortgagor. The question underwent great consideration, and it was discovered that there was an old term of years, to the benefit of which the mortgagee was clearly entitled in preference to any other person, although it was not actually assigned to a trustee for him. The case was again laid before the Solicitor-general, who then wrote an opinion that the title of the mortgagee would be preferred to that of the crown. He stated, that upon a short inquiry before he wrote his former opinion, it had been represented to him, that estates held in trust for a debtor of the crown were usually seized under extents, and were considered as bound by his debts in the same manner as those of which he was legally seised. He had since desired a further search to be made, and was then informed that no instances were to be found in which a trust-estate of such debtor fairly parted with to a purchaser without notice had been deemed to be liable to the debts of the crown, and in consequence of this information his opinion then inclined in favour of the mortgagee. And he gave a similar opinion on this point in the year 1801,

so that he had not seen any reason to alter his opinion after a lapse of nearly twenty years.

The principal grounds of the determination in the King *v.* Smith were three:—1st, that the lands of a debtor to the crown might be extended into whatever hands they might have been aliened, subsequently to their becoming liable to the crown; 2dly, that the estates of which the debtor was *cestui que trust* might be extended; and 3dly, the decision in the case of the Attorney-general *v.* Sands (*k*). The two first positions of the Court may be admitted to be law, without, as it should seem, at the same time admitting that a purchaser cannot protect himself against the crown by an outstanding legal estate. Indeed it was the third ground upon which the Court principally relied, and built their decree.

The determination in the case of the Attorney-general *v.* Sands was, that the trust of a term attendant on the inheritance was not forfeited by the felony of the *cestui que trust*, because it was no more than an accessary to the inheritance, which was not forfeited. In the King *v.* Smith the Court of Exchequer thought that the converse of this case must be taken to be true. The term was not forfeited, because the inheritance was not forfeited; but if the inheritance had been forfeited, the term must have been forfeited. The case of the Attorney-general *v.* Sands was decided in a court of equity, and appears wholly to depend upon the rules of equity as to attendant terms; and on the like principle, it may be thought that the same judges would have denied relief against a purchaser in a case similar to that of the King *v.* Smith; and that no such relief could at this day be granted. If any remedy, therefore, lies against the purchaser, it must be at law. Now at law the term in the

(*k*) Hard. 2 Freem. 3 Cha. Rep.

trustee

trustee is a term in gross. A legal title, prior to the right of the crown, must prevail at law; and the Court ought not to advert to the trust, only for the purpose of taking the protection of the term from the *bonâ fide* object of the trust, for even the *arts* of the law in introducing collateral warranties, discontinuances, and non-claims *to protect the possession and strengthen the rights of purchasers*, have been the subject of commendation from the great Lord Nottingham; and it is admitted that if the term be in gross, an assignment before any actual extent will stand good against the king's debt (*l*). Lord Hardwicke's decision in Willoughby *v.* Willoughby is an elaborate performance, and was certainly pronounced after great consideration. Every point was adverted to, and yet his Lordship lays the rule down generally, that a purchaser may protect himself against all mesne incumbrances by a prior legal term, and does not except the case of the crown. And in pronouncing judgment in the Attorney-general *v.* Sands, the Chief Baron observed, that the term was only kept on foot to avoid incumbrances which might affect the inheritance; and yet, although he was discussing the rights of the crown, he did not seem to consider that the term would not prevail over crown debts. It is not denied, that in general where a term is attendant on the inheritance, if the king extends the inheritance he shall have a right to the term (*m*), but the question here turns upon what, it is conceived, ought to form an exception to that rule, viz. a purchase by the person claiming the benefit of the term *bonâ fide*, and without notice of the claim of the crown.

It remains only to observe, that in this commercial country, any decision that tends to clog the free aliena-

(*l*) 2 Vern. 390.

(*m*) See the 2d resolution in Nicholls *v.* How, 2 Vern. 389.

 tion

tion of property, and to render the titles of fair purchasers insecure, cannot but be productive of the most serious consequences, and well demands the interference of the legislature, if the law is two well settled to be overruled.

In a still later case (*n*), in which the case of King *v.* Smith appears to have been forgotten, where a man having agreed before marriage to purchase and settle estates, entered into bonds to the crown, and then made a purchase, and afterwards settled the estate according to the articles, it was held that a mortgage term assigned to attend upon the purchase did not protect the inheritance against the crown debt, *because the settlement was voluntary.* There was no covenant in the articles which specifically bound the lands. The assignment of the term therefore could not, it was held, defeat the right of the crown.

Mr. Butler justly observes, that "a term should never be relied on, unless proof can be obtained easily, and at a small expense, of the instruments and acts in law, which must be proved to establish the creation and deduction of the term. It should also be ascertained, that its situation is such as enables the party entitled to it, to avail himself of it in ejectment (*o*)." And to enable the purchaser to avail himself of the term, it is indispensably necessary that he should not have notice, either express or implied, of the incumbrance or title against which he is desirous of using the term as a protection. Mr. Powell, indeed, although he admits that terms, the purposes of whose creation are answered, and which have been expressly assigned to attend the inheritance, will not be any protection to a pur-

(*n*) Rex *v.* St. John, 2 Price, 317. See Rex *v.* Hollier, 2 Price, 394.

(*o*) N. (1), s. 13, to Co. Lit. 290, b.

chaser

aser of the inheritance who had notice of any judgments, c. yet contends, that where a purchaser of the inheritance tains a term in gross, the purposes of whose creation re not answered at the time of the purchase (I), or a rm the purposes of whose creation were answered, but hich had not been expressly assigned to attend the heritance, but merely waited upon the freehold by nstruction of equity, such purchaser can defend his ssession by the term, although he had notice of any tervening judgment.

This is an attempt to establish a *new* distinction between term assigned upon an express trust to attend the inheritance, and a term attendant by the construction of equity, attempt which Lord Hardwicke appears to have overlaid in the case of Willoughby *v.* Willoughby; and it uld be very imprudent for a purchaser of an estate in y case to rely on a term of years, as a protection against y incumbrance, of which he has express or implied tice.

It is, however, settled by a series of authorities (*p*), that

(*p*) Lady Radnor or Bodmin *v.* Tharham or Vendebendy, Prec. a. 65; 1 Vern. 179. 356; 2 a. Ca. 172; Show. P. C. 69; wn *v.* Gibbs, Wray *v.* Wil- ms, Dudley *v.* Dudley, Prec. a. 97. 151. 241; and see Banks *v.* Sutton, 2 P. Wms. 700 (II); Hill *v.* Adams, or Swannock *v.* Lyford, 2 Atk. 208; Ambl. 6; Butler's n. (1) to Co. Litt. 208, a.; Wynn *v.* Williams, 5 Ves. jun. 130; D'Arcy *v.* Blake, 2 Scho. and Lef. 387; and see *supra*, p. 315.

(I) In this case the purchaser could of course defend himself against a subsequent incumbrancer to the extent of the subsisting charge on the term at the time of the purchase. It has, indeed, been thought that where are two mortgagees, and the first in point of charge buy the inheritance, he lets in the other on the estate discharged of the prior mortgage. See, however, Kennedy *v.* Daly, 1 Scho. and Lef. 355.

(II) Note, this case is generally thought to be overruled, but Mr. Powell has endeavoured to show, that it is not affected by later decisions.

that a purchaser may protect himself against the dower of the vendor's wife, by a term created previously to her right of dower attaching on the estate, although he had actual notice of the marriage, and of her title to dower; a protection, as we shall hereafter see (*q*) to which a purchaser with notice is not entitled in any other instance, or against any other person.

The term, however, must be actually assigned to a trustee for the purchaser, if it is intended to be used as a bar to the wife's dower (*r*); because, by the rules of equity, every term attendant on the inheritance follows it in its various modifications, and in the charges and incumbrances which attach on it, or are created in it (*s*); and therefore, upon the marriage of a man seised of lands of inheritance, in which there is a term outstanding, a right of dower attaches on the inheritance, by the act of law, and in equity the term is equally bound with the inheritance; and as the claim of a purchaser is not more favoured in equity than that of a dowress, a purchaser will not be entitled to the benefit of an outstanding term, to the prejudice and in exclusion of a dowress. Indeed the deci-

(*q*) *Infra*, ch. 16.

(*r*) See Maundrell *v.* Maundrell, 7 Ves. jun. 567, 10 Ves. jun. 246, particularly the close of the judgment.

(*s*) See Charlton *v.* Low, 2 P. Wms. 328.

See 2 Mort. 731, 4th edit.; and in a manuscript note of the Attorney-general *v.* Scott, *penes auctorem* (For. 138,) Lord Talbot is reported to have said, that the reason of the decree in Banks *v.* Sutton was different, for there the direction of the will was, that the legal estate should be conveyed to Sutton, and the wife married him on the expectation of that estate, and it was a fraud in the husband not to call for the settlement. See a fuller note of this case than that which is published, Appendix, No. 17. In the late case of D'Arcy *v.* Blake, 2 Scho. and Lef. 387, it was said by the Court, that what was thrown out by Sir Joseph Jekyll, in Banks *v.* Sutton, had been long overruled.

sion

tion (*t*), that a purchaser could defend himself against a claim of dower by a term assigned to a trustee for him, proceeded not on principle, but on the universal practice and opinion of conveyancers in that respect; for (*u*) the Court of Chancery and House of Lords were of opinion, that if they were not to permit that to be so, it would be to overturn the general rule which had been established and practised by many titles to estates, and tend to make such titles precarious for the future. The same reason does not apply where the purchaser neglects to take an assignment of the term; it having always been the general understanding and opinion of conveyancers that, to protect against dower, the term must be actually assigned to a trustee for the purchaser.

In Swannock *v.* Lifford (*x*), Lord Hardwicke appears to have considered it clear, and it was admitted at the bar, that if a man before marriage conveys his estate privately, without the knowledge of his wife, to trustees, in trust for himself and his heirs in fee, that will prevent dower; and it appears that this was practised by a reverend judge of equity, Mr. Sergeant Maynard, who made a lease to his servant the day before his last marriage (*y*). But the counsel who argued for the respondent in Radnor *v.* Vendebendy, before the House of Lords, seem to have admitted, that if a husband *just before marriage*, make a long lease on purpose to prevent dower, and the woman *expecting the privileges which the common law gives to women married*, survive him, equity may interpose; and this doctrine has been distinctly recognized by a learned judge and

(*t*) Lady Radnor *v.* Vendebendy, Show. P. C. 69.

(*u*) *Per* Lord Hardwicke. See Butler's n. *ubi sup.*

(*x*) Butler's n. (1) to Co. Litt. 208, a; and see 2 P. Wms. 709. Note, in the case of Bottomley *v.* Lord Fairfax, Prec. Cha. 336, the Court did not advert to a conveyance made *immediately* before marriage.

(*y*) See Show. P. C. 71.

author (*z*). And as this opinion may be supported by weighty reasons, a purchaser cannot, it is conceived, be advised to rely upon a legal estate, created in fraud of the rights of marriage, as a protection against the wife's dower (*a*).

It hath been just observed, that by the rules of equity every term attendant on the inheritance follows it in its various modifications, and in the charges and incumbrances which attach on it, or are created in it. Now it is a consequence of this rule, that whenever the inheritance is conveyed or charged, the trustee of the term becomes a trustee for the person in whose favour the estate is conveyed or charged, to the extent of his claims on the estate. If the trustee have notice of such purchase or incumbrance, his conscience will be affected; and if he assign the term to a subsequent purchaser, or incumbrancer, it would be a breach of trust, and he would in equity be decreed to make satisfaction (*b*). A trustee, therefore, of a term to attend the inheritance, cannot be advised to assign the term to *any* purchaser or incumbrancer, unless he is satisfied that his immediate *cestui que use* has not done any prior act to charge the inheritance (*c*).

As a trustee ought to be satisfied, that the person by whose direction the term is assigned, is the person entitled to require the assignment, it is usual, by way of authority to the trustee, to recite all the instruments, &c. affecting the fee, from the time the term was created to the

(*z*) Gib. Lex Prætor. 267.

(*a*) As to settlements by women previously to marriage, in derogation of the marital rights, see Countess of Strathmore *v.* Bowes, 2 Bro. C. C. 345, 1 Ves. jun. 22, and the cases there cited, which may be thought, in some measure, to apply to the point under consideration.

(*b*) 1 Term Rep. 771.

(*c*) See 1 Pow. Mort. 507, 508, 4th edit.; Evans *v.* Bicknell, 6 Ves. jun. 174. *Ex parte* Knott, 11 Ves. jun. 609.

date

date of the deed of assignment; and this is very commonly done, even where the term has been assigned to attend the inheritance. In the latter case, however, such a recital is both unnecessary and improper; for the trustee can only be affected by the acts of his own *cestui que trust*; and therefore, where a term has been actually assigned to attend the inheritance, on a future assignment of it, it is only necessary to recite the deed creating the term, that by divers conveyances and assurances the fee became vested in *A*, (the person requiring the assignment); and that by divers assignments and acts in law, and ultimately by such a deed (the assignment to attend) the term became vested in the trustee, in trust for *A*; and then any instruments affecting the fee, since the last assignment of the term, to attend the inheritance, should be recited.

VI. Before we quit this very interesting subject, let us inquire in what cases a term of years will attend the inheritance without an express declaration of trust for that purpose (*d*).

First then, it is a general rule, that whenever a term would merge in the inheritance if united, it shall attend, if in a different person, without an express declaration, by implication of law founded on the statute of frauds (*e*). And the custom of London shall not prevail over this operation of law (*f*).

(*d*) See an admirable opinion of Mr. Fearne's respecting terms of years, 2 Coll. Jur. 297. Mr. Powell has in the last edition of his Treatise on Mortgages, inserted this opinion without acknowledgment. See 1 Mort. 483–489.

(*e*) See 1 Bro. C. C. 70.

(*f*) Greene *v.* Lambert, 1 Vern. 2, cited; Dowse *v.* Derivall, *ibid.* 104; 2 Vern. 57; Reg. Lib. A. 1683, fol. 283. It is said in the decree, that the lease and conveyance were in law one conveyance; Rich *v.* Rich, 2 Cha. Ca. 160.

 Therefore,

Therefore, where a person purchases the inheritance in his own name, and takes an assignment of a term in the name of a trustee (*g*); or takes a conveyance of the fee in the name of a trustee, and an assignment of a term in his own name (*h*); in both these cases the term attends the inheritance, unless there be an express declaration to the contrary, whether the term be purchased or obtained before or after the purchase of the fee. And in general there is no difference between an assignment of a term to a trustee, in trust to attend the inheritance, and an assignment to a trustee, in trust for the purchaser, his executors, administrators and assigns (*i*).

So the same rule prevails where a man possessed of a term for years contracts for the inheritance, for the vendor stands seised in trust for the purchaser from the time of the contract (*k*).

And where, by reason of an intermediate term outstanding, a term cannot merge, although vested in the purchaser together with the fee, yet if the purchaser be entitled to such outstanding term, even the term vested in the purchaser, and which cannot merge, shall attend the inheritance, without any express declaration for that purpose (*l*).

And even if the purchaser cannot obtain an assignment of the whole term, yet, if a nominal reversion only, as a

(*g*) Tiffin *v.* Tiffin, 1 Vern. 1; 2 Cha. 49. 55; Whitchurch *v.* Whitchurch, 2 P. Wms. 236; 9 Mod. 124; Gilb. Eq. Rep. 168; Goodright *v.* Sales, 2 Wils. 829.

(*h*) North *v.* Langton, 2 Cha. Ca. 156; Dowse *v.* Derivall, 1 Vern. 104; Attorney-general *v.* Sands, 3 Cha. Rep. 19.

(*i*) Best *v.* Stamford, Prec. Cha. 252; Tiffin *v.* Tiffin, 1 Vern. 1; Holt *v.* Holt, 1 P. Wms. 374, cited; Pitt *v.* Cholmondley, Chancery, 9 Nov. 1751, MS.

(*k*) Capel *v.* Girdler, Rolls, 16th March 1804, MS.; 9 Ves. jun. 509; Cooke *v.* Cooke, 2 Atk. 67. *Vide supra*, ch. 4.

(*l*) Whitchurch *v.* Whitchurch, 2 P. Wms. 236; 9 Mod. 124; Gilb. Eq. Rep. 168; and see 1 Bro. C. C. 170.

reversion

reversion of a few days, be left outstanding, so much of the term as is assigned to a trustee for the purchaser will be deemed attendant on the inheritance, without any express declaration for that purpose. But where the term is subject to rents or charges in favour of other persons, whereby the purchaser has not *substantially* the whole *beneficial* interest in the estate, there an express declaration is necessary to make the term attendant. The mere intent of the purchaser to purchase the whole interest, and that the term should attend the inheritance, will not vary the case.

The two last propositions appear to be established by the case of Scot *v.* Fenhoullet (*m*). From the imperfect statement of the facts in this case, it is difficult to understand the ground of Lord Thurlow's decision; and it has been generally thought, that the decree turned on the reversion, which the purchaser could not get in (*n*). The facts, as stated in Lord Thurlow's judgment, on the rehearing, reported in Brown, are shortly these: Mrs. Rudger was seised in fee of the estate, subject to two terms of years, upon which it should seem small rents were reserved; which terms were vested in trustees in trust for Mrs. Rudger for life, and for raising certain annual and gross sums of money. Sir Andrew Chadwick purchased of Mrs. Rudger the fee-simple estate, and so much of the terms as related to it; and the trustees executed their power by granting a derivative lease to trustees for Sir Andrew, with a nominal reversion (eleven days) to themselves. Lord Thurlow admitted, that Sir Andrew meant to purchase the whole interest, and that his intent was, that the terms should attend the inheritance. If they did attend the inheritance in this case, it must, his Lordship

(m) 1 Bro. C. C. 6. 9.

(n) See Capel *v.* Girdler, MS. and 9 Ves. jun. 509; 1 Cruise's Dig. 513, s. 17, and the marginal abstract of the case in Brown.

said,

said, be by implication of law, as there was no express declaration; and, after showing that the case of Whitchurch *v.* Whitchurch (*o*) did not apply to the case before him, because that there no interest was outstanding, except in form; he added, "Sir Andrew Chadwick might have given these terms to a stranger, and if the inheritance descended, the heir at law might demand the rents reserved by the leases. It is said to be extremely plain, that Sir Andrew Chadwick meant to consolidate the interests: this is begging the question. It is true he meant to take the largest interest he could, but by no means apparent that he meant to consolidate the interests. *I lay no stress on the days of the reversion, for it was meant only as a nominal reversion; they did not mean to reserve a substantial interest.* It would be necessary there should be an express trust to make this attendant on the inheritance; the transaction does not supply a necessary construction of law. It is a very nice point, and a very new one; whether the intent to purchase the whole interest is sufficient to make the term attendant on the inheritance. *The impossibility he was under of purchasing the whole, rendered an express declaration necessary to make it attend the inheritance.*" Now, at first sight, it certainly does seem impossible to reconcile those parts of the judgment which are printed in italics. But it appears by an opinion of Mr. Fearne's (*p*), in consequence of which the cause was reheard, that rents were reserved by the leases granted by the trustees to Sir Andrew Chadwick, and the usual covenants were entered into by him, and the trustees were restrained to that mode of making a title by their trust, which required a reservation of rent, and the usual covenants.

This fact at once reconciles every part of the judgment. Lord Thurlow was of opinion, that the reversion of itself

(*o*) *Supra.* (*p*) 2 Collect. Jurid. 297. No. 6.

was

was immaterial, but that the rents reserved by the leases rendered an express declaration necessary to make the terms attend the inheritance. And Mr. Fearne was also of opinion, that the terms would not be attendant, if there was any intervening *beneficial* interest in any third person, to divide the ownership of the term from the inheritance. But as he was told, that the rents reserved to the trustees upon the terms were afterwards purchased by Sir Andrew, he thought the terms did attend the inheritance, although there was not any express declaration for that purpose; and he expressly delivered his opinion, subject to this fact, which he had learned from verbal information only. By Lord Thurlow's decree on the rehearing, it appears clearly that the rents were not purchased, and consequently Mr. Fearne was misinformed in this respect.

Mr. Fearne's opinion on this point is very strongly marked; for he thought, that if there was any intervening outstanding *interest* between the ownership of the term and the inheritance, even an express declaration of trust could not make the terms attendant. This, however, was going too far; and Lord Thurlow, who had probably seen this opinion, addressing himself to the cases in which a term would attend the inheritance, said, that might be by two ways: first, by express declaration; and then, whether the trust would or would not merge, and whether the reversion be real or only nominal, it must be attendant on the inheritance.

We have seen that where a term attends the inheritance without any express declaration, it is by implication of law; and this implication, like all implications of law, or equitable presumptions, may be rebutted by even a parol declaration of the person in whose favour the implication or presumption is made (*q*).

(*q*) See *post*. ch. 15.

VII. A term for years attendant on the inheritance, whether by express declaration or by implication, is governed by the same rules as the inheritance itself is subject to. Therefore it will not be forfeited by the felony of the owner of the inheritance (*r*); but if the inheritance escheat, the term will go with it (*s*).

So it seems, that such a term cannot pass by a will not executed according to the statute of frauds (*t*). But it appears to have been thought, and the distinction, it is conceived, may be supported on very solid grounds, that where a term attends the inheritance merely by operation of law, the owner may *expressly* bequeath it by a will not executed with the solemnities required by the statute (*u*).

It is clear, that where the devisor intended the inheritance to pass, but, by reason of the informality of the will, it descends to the heir, the term shall not go to the devisee, but shall follow the inheritance in its devolution on the heir (*x*).

So where a termor for years, having contracted for the fee, made his will, whereby, after reciting that he had purchased the term, and contracted for the fee, a conveyance of which could not then be obtained, he declared, that when a conveyance could be had, the estate should be settled to the uses mentioned in his will, and directed that the remainder of the term should remain and be attendant on the inheritance. The person who contracted to sell the fee was not owner of it, and the owner sold it to another person. Sir Joseph Jekyll held, that the testator

(*r*) Attorney-general *v.* Sands, 3 Cha. Rep. 19; Hard. 488.

(*s*) Thruxton *v.* Attorney-general, 1 Vern. 340. 357.

(*t*) Tiffin *v.* Tiffin, 2 Cha. Ca. p. 40. 55; 2 Freem. 66; Whitchurch *v.* Whitchurch, Gilb. Eq. Rep. 168; Villiers *v.* Villiers, 2 Atk. 71. *Note*, Nourse *v.* Farworth, Finch, 155, was before the statute of frauds.

(*u*) See 9 Mod. 127; and see 2 Collect. Jurid. 276.

(*x*) Cases cited *ante*, n. (*t*).

tator intended to pass the inheritance; and although he had it not, yet the term could not pass by the will, as such a construction would be contrary to the testator's intention (*y*).

As the inheritance of an estate is not liable to simple contract debts, it follows, on the principle before noticed, that a term attendant on the inheritance is not personal assets for the payment of debts (*z*), but it is generally stated that such a term is *real* assets:—This is, however, a very incorrect expression: the term itself is not real assets, but is merely attendant on the inheritance, which is. In Chapman *v.* Bond (*a*), it appears to have been thought, that although the term was in a trustee, yet if it attended the inheritance by construction of equity only, it should be assets in equity for payment of the owner's debts, in like manner as a term taken in his own name would be assets at law. But this opinion is clearly overruled; and where the term is in a trustee, the same rules prevail on this point, whether the term be attendant by express declaration or not (*b*). In one case it is made a query, whether if tenant in tail contract debts by bond and die, and it can be made to appear that some of his ancestors, who bought the estate, found an old mortgage upon it for a long term of years, which was kept on foot to wait upon the freehold and inheritance, such lease in equity would not be assets in the hands of the heir in tail, for it is equity only makes

(*y*) Bret *v.* Sawbridge, 3 Bro. P. C. 141. Tom. ed. and see Fearne's Ex. Dev. by Powell, 145, n. (*a*). S. C. Appendix, No. 18. This note of the case will, I hope, be acceptable to the reader. It contains a concise statement of the facts, and Sir Joseph Jekyll's judgment, which is, I believe, not in print, and comprises some interesting remarks on executory bequests of terms.

(*z*) Thruxton *v.* Attorney-general, 1 Vern. 340; Tiffin *v.* Tiffin, 1 Vern. 1.

(*a*) 1 Vern. 188.

(*b*) Baden *v.* Earl of Pembroke, 2 Vern. 52. 213; 2 Trea. Eq. c. 4, s. 6.

such

such leases descend, and it is the highest equity, that a man's debts should be paid (*c*). There is not, however, the least foundation for this doubt. Equity, in this respect, follows the law, and at law the estate is not bound.

But where the inheritance is in trustees, and the owner has a term in his own name, and dies indebted, the term, although limited to attend the inheritance, will be liable to debts, for it is assets at law (*d*); and equity here follows the law (*e*), and therefore a purchaser should never take the term in his own name, if he do not wish his estate to be personal assets.

If after the death of a person who has taken an assignment of a term in his own name, and a conveyance of the inheritance in the name of a trustee, his personal representative assign the term to attend the inheritance, it will cease to be assets at law; and the creditors or legatees will be entitled to satisfaction against the personal representative, as for a *devastavit*; and may, it should seem, even follow the term in equity, unless as against a *bonâ fide* purchaser without notice, against whom the term will not be severed or disannexed from the inheritance in favour of the creditors or legatees, although the purchaser did not take an assignment of the term, or was even not aware of its existence (*f*).

(*c*) Anon. 11 Mod. p. 5.

(*d*) Thruxton *v.* Attorney-general, *ubi sup.*; Chapman *v.* Bond, 1 Vern. 188; Attorney-general *v.* Sands, Hard. 488.

(*e*) See 2 Cha. Ca. 40; Earl of Pembroke's case, 9 Mod. 125, cited.

(*f*) Charlton *v.* Low, 3 P. Wms. 32.

SECTION III.

Of Attested Copies.

THUS have we taken a cursory view of the doctrine re-
pecting terms of years, a learning which demands the
ractical conveyancer's peculiar attention; and we are
ow to consider in what cases a purchaser is entitled to
tested copies of the title-deeds.

If a purchaser cannot obtain the title-deeds, he is, as we
ve already seen, entitled to attested copies of them at
e expense of the vendor, unless there be an express
ipulation to the contrary (*a*); and although he may not
e entitled to the possession of the deeds, yet he has a
ght to inspect them, and the vendor must produce them
r that purpose (*b*).

But a purchaser is not entitled to attested copies of in-
ruments on record.

This was decided in the case of Campbell *v.* Campbell (*c*),
here the Master, in taxing costs incurred by the sale of
nsiderable estates, disallowed the charges for attested
pies of deeds and documents upon record; and upon
ceptions to his report on that account coming on,
e Master of the Rolls overruled them, and held that a
rchaser was not entitled to such copies at the expense
the vendor.

In some cases, however, a purchaser can obtain attested
pies even of instruments on record. For a purchaser

(*a*) Dare *v.* Tucker, 6 Ves. jun. 0; Berry *v.* Young, 2 Esp. Ca. 0, n.

(*b*) Berry *v.* Young, *ubi sup.*

(*c*) Rolls sittings after ——— Term, 1793, MS.

is

is entitled to examine the abstract with the original title-deeds, or with attested copies of them; and, therefore, if a vendor has not the instrument itself, and cannot obtain it, he is bound to procure an attested copy of it, to enable the purchaser to ascertain that the abstract is correct; and when it is obtained, the purchaser is of course entitled to it on the completion of the purchase; unless, indeed, the vendor retains other estates holden under the same title.

In a case before Lord Rosslyn, where there was an agreement, that the vendor should produce the original title-deeds, his Lordship construed it, not only as an engagement to produce the title-deeds, but as a negative stipulation, that he should not give attested copies. This was certainly presuming a great deal. Lord Eldon has since thought that the pressure of the stamp duties led to that decision (*d*); and, it is probable, that a similar case would now receive a different determination.

In a recent case, Lord Eldon compelled the vendor, at his own expense, to furnish attested copies, the purchaser having had no intimation that he could not have the deeds. For, his Lordship said, if he had notice that he was not to have them, he would regulate his bidding accordingly; conceiving that he was to bear the expense of procuring copies (*e*). From this, it may be inferred, that notice that the purchaser cannot have the deeds is tantamount to a stipulation, that he shall not be furnished with attested copies at the seller's expense. The general practice of the profession, founded on the decided cases, is, that the seller, in the absence of an express stipulation to the contrary, is bound, at his own expense, to furnish the purchaser with attested copies: and Lord Eldon does not appear to have intended to establish a new rule.

(*d*) See 6 Ves. jun. 460. (*e*) Boughton *v.* Jewell, 15 Ves. jun. 176.

Where

Where a purchaser cannot claim the title-deeds, it is of eat importance to him to obtain attested copies of them. ut attested copies are not of themselves sufficient secu- y to a purchaser,—they are indeed mere waste paper ainst strangers, and cannot be used upon an ejectment, less, perhaps, as between the parties themselves. There- re, in order to enable a purchaser to effectually manifest d defend his title and possession, he is also entitled, at e expense of the vendor, to a covenant to produce the eds themselves, at the expense of the purchaser (*f*); hich should, in most cases, be carried into effect by a parate deed. And where a vendor retains the deed by hich the estate he is selling was conveyed to him, (which mostly the case when it relates to other estates) it seems visable for the purchaser to require a memorandum of s purchase to be indorsed on such deed.

And where the title-deeds cannot be delivered, assignees ust, like any other vendor, give attested copies of them the expense of the estate, but their covenant for the oduction of the deeds should be confined to the time of eir continuance as assignees (*g*). If, however, the venant is so confined, the purchaser should have some urity that the person who shall ultimately become en- led to the custody of the deeds will covenant for their oduction. The proper course seems to be for the as- nees' covenant to be made determinable in case they all procure the person to whom they shall deliver the eds to enter into a similar covenant with the purchaser. It may here be remarked, that although a purchaser of rt of an estate has taken a covenant for the production the deeds, yet, if they afterwards come into his pos-

(*f*) Berry v. Young, 2 Esp. 640, n.

(*g*) *Per* Lord Eldon, *Ex parte* Stuart, 2 Rose, 215.

session by accident, no person can recover them from him who has not a better right to them than he has (*h*).

Supposing a purchaser to be entitled to the custody of the deeds themselves, yet if any of them be lost, and the vendor can deliver over copies which would be admitted as evidence at law, the purchaser will be compelled to take the title (*i*). But where a deed essential to the title is in the hands of a third person who is entitled to retain it, and would be compelled to produce it to the purchaser, the Court will not compel the purchaser to take the title unless the deed is deposited for the benefit of all parties (*k*).

It frequently happens, that a person having a covenant for production of the title-deeds to his estate, sells only part of the estate, and retains his purchase-deed, and the covenant to produce the deeds; and in such cases I should conceive the practice to be for the vendor to enter into the usual covenant for production of the title-deeds in his possession, which of course would include the original covenant to produce the deeds. But it seems that Mr. Fearne thought (*l*), that a purchaser was, in cases of this nature, entitled to require the vendor to covenant for the production of the deeds to such an extent as the covenant in the vendor's possession entitled him to the production thereof, unless he could procure a new covenant for that purpose from his grantors to the new purchaser; but that such covenant from the vendor should not be enforced, in case he produced the original covenant to produce the

(*h*) Yea *v.* Field, 2 Term Rep. 708.

(*i*) Harvey *v.* Philips, 2 Atk. 541. See an opinion of Mr. Booth's, 2 Ca. and Opin. 223. As to the cases in which the execution of an instrument will be presumed, see Skipwith *v.* Shirley, 11 Ves. jun. 64; Ward *v.* Garnons, 17 Ves. jun. 134; and see Holmes *v.* Aubie, 1 Madd. 551.

(*k*) Shore *v.* Collett, Coop. 234.

(*l*) Posth. 113.

deeds,

deeds, when it should be required to defend the purchaser's title.

It is not unusual to insert a proviso in a deed of covenant to produce title-deeds, for determining the covenant, in case the vendor sell the part of the estate retained by him, and procure the person to whom the estate is sold, and the title-deeds are delivered, to enter into a similar covenant with the first purchaser, for production of the title-deeds.

SECTION IV.

Of Covenants for Title.

LET us now proceed to consider what covenants for title a purchaser is entitled to.

The covenants usually entered into by a vendor seised in fee, are, 1st, that he is seised in fee; 2dly, that he has power to convey; 3dly, for quiet enjoyment by the purchaser, his heirs and assigns; 4thly, that the estate is free from incumbrances; and lastly, for further assurance (*m*).

Where a vendor has only a power of appointment, the first covenant ought to be, that the power was well created, and is subsisting; and the other covenants should be similar to those entered into by a grantor seised in fee. In small purchases the first covenant is sometimes omitted, which may be safely done, for the first and second are synonymous covenants.

It sometimes happens, that a purchaser consents to take a defective title, relying for his security on the vendor's

(*m*) See *post*, ch. 13.

covenants. Mr. Butler remarks, that where this is the case, the agreement of the parties should be particularly mentioned, as it has been argued, that as the defect in question is known, it must be understood to have been the agreement of the purchaser to take the title subject to it, and that the covenants for the title should not extend to warrant it against this particular defect (*n*). And it may be further observed, that in cases of this nature, unless the objection to the title appear on the face of the conveyance, the agreement to indemnify against the defect, and the covenants to guard against it, should be entered into by a separate instrument.

With respect to the *persons* against whose acts a vendor is bound to covenant, it seems that,

1st. A vendor who actually purchased the estate himself, for money, or other valuable consideration, and obtained proper covenants for the title, is not bound to enter into covenants extending beyond his own acts (*o*). This, Mr. Fearne remarks (*p*), is a practice founded in reason, where the vendee obtains the full benefit of all the covenants in the conveyance to the vendor, to the same extent as his vendor has them, by obtaining the possession of the deeds containing those covenants. When the vendor has parted with his means of claim or remedy against his grantor for breach of his covenants, and transferred them to the purchaser, by delivery of the deeds, and such vendee comes into the vendor's place, in that respect, by the acquisition of such deeds, it would be unreasonable that the vendor should make himself liable for any such breach. He, by departing with the means of remedy or

(*n*) See Butler's n. (1) to Co. Litt. 384, a. See also Savage v. Whitbread, 3 Cha. Rep. 14.

(*o*) See 2 Bos. and Pull. 22; and see two opins. in 3 Pow. Convey. 206. 210.

(*p*) Posth. 110.

compensation,

npensation, must be understood to have discharged
iself from, and the vendee, by accepting those means,
iave taken upon himself the peril or risk of such breach,
l the duty of enforcing its remedy or compensation.

idly. Mr. Fearne, however, thought, that where a ven-
r retains the title-deeds, he is bound to enter into cove-
its extending to the acts of the persons against whose
s he is indemnified by the deeds in his possession (*q*):
: he also thought these covenants should be qualified by
' insertion of a covenant on the part of the purchaser,
t in case any claim should be made under the vendor's
'enants against the acts of the former owner, and he
e vendor) should produce the deeds, in order to ena-
the purchaser to avail himself of the covenants con-
ied in them, then no advantage should be taken of the
idor's covenants.

This, however, is a distinction never attended to in
ictice: if a vendor is entitled to retain the deeds, he
ers into the usual covenant for the production of them,
: never enters into more extensive covenants for the
e, on account of the retention of the deeds.

3dly. Where a vendor does not claim by purchase in
vulgar and confined acceptation of that word (*r*); that
by way of bargain and sale for money, or some other
uable consideration, a purchaser is entitled to require
'enants from such vendor, extending to the acts of the
: purchaser. For instance, if I sell an estate which
i devised to me, and the devisor's father purchased the
ite, the covenants for title are extended to the acts of
father (*s*). And a person claiming under a voluntary
iveyance, is considered in the same light as a devisee.

) See the Lord Buckhurst's , 1 Rep. 1.

) See 2 Black. Comm. 241.

(s) See acc. two opin. in 3 Pow. Conv. 206. 210.

So a person whose estate is sold under an order of a court of equity, or by a trustee to whom he has conveyed it upon trust to sell, is bound to covenant for the title in the same manner as he must have done if he himself had sold the estate.

But although the *universal and settled practice* of conveyancers is, to extend covenants for the title to the acts of the last purchaser, yet the Court of Chancery appears to hold, that a person not claiming by purchase is only bound to covenant against his own acts, and those of the person immediately preceding him (*t*). The rule established by practice is undoubtedly the most reasonable, for every purchaser is certainly entitled to a regular chain of covenants for the title. No solid reason can be given, why any line should be drawn, and the covenants should extend to the person only who immediately preceded the vendor; and, however the Court of Chancery may act upon this rule, the practice of the profession has taken too deep a root to be easily extirpated.

4thly. Where an estate is sold by trustees under a will, and the money is to be applied in payment of debts, &c. and the residue is given over, a purchaser is not entitled to any covenants for the title, because no line can well be drawn as to the *quantum*, which would make a person liable to covenant; and therefore, if this rule were not settled, a person who only took 5*l.* might as well be required to covenant, as one who took a large sum (*u*).

The same rule applies *ex necessitate* when an estate is sold for similar purposes under an order of a court of equity. If a different rule prevailed, the consequence would

(*t*) See 3 Atk. 267; 3 Ves. jun. 236; and see 14 Ves. 239.

(*u*) Wakeman *v.* Duchess of Rutland, 3 Ves. jun. 233. 504. affirmed in *Dom. Proc.* 3 Bro. P. C. 145; and see Lloyd *v.* Griffith, Atk. 264.

would be, that the estate could never be sold by decree, till the account was taken of all the debts; because, before that account was taken, it could not appear who were to join in the conveyance, what was the number, and in what proportions they were beneficially entitled: but it is the constant practice to sell the estate in the first instance; of course the title can be made only by the trustees for sale, without calling in the parties who are presumptively beneficially interested (*x*).

In both these cases, therefore, the purchaser is only *entitled* to a covenant from the parties conveying, that they have done no act to incumber. But it is to be lamented, that in these instances also the rule of the Court of Chancery differs from the practice of the profession; for it always has been, and still is, the practice of the profession to make all the *cestuis que trust*, whose shares of the purchase money are in anywise considerable, join in covenants for the title, according to their respective interests.

The rule of equity on this subject may of course be altered by the agreement of the parties (*y*); and therefore, in all agreements for purchase of estates from devisees, &c. in trust to sell, the purchaser should stipulate, that such of the persons entitled to the purchase money as he may require, shall join in the usual covenants for the title. Where, however, the trust is to pay debts, or trifling legacies, which will exhaust the whole of the purchase money, it is obvious that such a stipulation could not be carried into effect, and it had therefore better be omitted.

It might, perhaps, be doubted whether equity would, in a case of this nature, enforce a specific performance against a purchaser who was ignorant, at the time he entered into the contract, of there not being any person to covenant for the title. To prevent any difficulty on this

(*x*) See 3 Ves. jun. 505, 506. (*y*) See 3 Ves. jun. 236.

ground, it seems advisable to state in the particulars of sale or agreement, that the vendors are devisees in trust to sell, and that the money is to be applied in payment of debts and legacies; which would be notice that the purchaser could not require covenants for the title.

It must, however, be remarked, that the case of Wakeman *v.* Duchess of Rutland is by no means an authority that *cestuis que trust* of money to be produced by the sale of estates devised to trustees to sell, cannot in any instance be required to covenant for the title. Where the money to arise by sale of the estate is absolutely given to two or more persons, they are substantially owners of the estate, and must accordingly covenant for the title.

So, even where the money is in the first place to be applied in payment of debts, yet if they are all paid previously to the sale, the *cestuis que trust* must, it is conceived, covenant for the title.

Upon this case another observation occurs. Lord Rosslyn seemed to think it dangerous to make the *cestuis que trust* parties to the conveyance; he said, the prudence of the common clause, that the receipts of the trustees shall be a discharge to the purchaser, would be defeated, and the purchaser would take upon himself the knowledge of all the trusts of the will (*z*). If this be so, conveyancers are indeed reprehensible; but as the purchaser buys under the will, whether the *cestuis que trust* are or are not parties to the conveyance, he is equally affected with the knowledge of the trusts; and yet, as *cujus est dare ejus est disponere*, it cannot be supposed that equity would compel a purchaser to see to the application of the purchase money, when the testator himself has declared he shall not. In Ewer *v.* Corbet (*a*), it was holden, that notice to a purchaser of a bequest of

(*z*) See 3 Ves. jun. 235.

(*a*) 2 P. Wms. 148.

a term

a term did not signify, *as every person buying of an executor where he is named executor, necessarily must have such notice.* This resolution applies to the point in question, and seems to place it beyond controversy.

Lastly, in conveyances by the crown, a purchaser is not entitled to any covenants for the title; and where an estate is sold by assignees of a bankrupt, the purchaser is only entitled to a covenant from the assignees, that they have not done any act to incumber the estate.

But a bankrupt is always made a party to the conveyance of his estate, to prevent the difficulty which the purchaser might otherwise be put to, in maintaining and proving the title; and the bankrupt is generally made to enter into covenants for the title in the same manner as he would have done, had he sold the estate while solvent.

SECTION V.

Of searching for Incumbrances.

It now comes in order to consider in what cases incumbrances should be searched for.

I. There are few cases in which judgments should not be searched for on the part of a purchaser; and if there is any reason to suspect the vendor, it is absolutely necessary to search immediately before the conveyance is executed, lest any judgments may have been entered up during the treaty; although if any judgments should be entered up after the purchase money, being an adequate consideration, is actually paid, equity would relieve the purchaser against the judgments, notwithstanding that they were entered up previously to the execution of the conveyance; the vendor being, in equity, only a trustee for

for the purchaser, and a judgment being merely a general lien, and not a specific lien on the land: and this equity prevails, whether the judgment creditor had or had not notice of the contract (*b*).

In a case where a reversioner in fee first executed a bond, with a warrant of attorney to enter up judgment, and then mortgaged to another in fee, and on the 1st of January 1810 contracted to sell the estate to a purchaser without notice, and on the 15th of February 1810 a judgment was entered up and docketed, and an inquisition taken thereon on the 20th of February 1810, of which notice was given to the purchaser on the 15th of April 1810, but on the 15th of March 1810, the mortgagee in fee and the mortgagor had conveyed the estate in fee to the purchaser without notice, and a part of the purchase money was secured to the seller by a legal term of years, and which was unpaid when notice of the judgment was given, *and afterwards the purchaser paid off the mortgage, and took a surrender of the term* (I), upon a bill filed by the judgment creditor, the Vice-Chancellor held, that as the greater part of the purchase money was paid, and the rest secured by the term when the notice was given, the judgment creditor had no remedy in equity against the fee. The purchaser was then the mortgagor for the term. The notice therefore was nothing more than notice to the mortgagor that a person to whom he had granted a legal term, by way of mortgage, was indebted on judgment; but a judgment is, at law, no lien upon a legal term; and where the interest of the debtor is legal, a judgment is no lien in equity. Notwithstanding this judgment, the debtor could well assign his legal term

(*b*) See Nels. Ch. Rep. 184; Ab. 118; and see Kennedy v. Daly, Finch v. Earl of Winchelsea, 1 P. 1 Scho. and Lef. 373; Prior v. Wms. 278; 10 Mod. 418; 11 Vin. Penpraze, 4 Price, 99.

(I) This fact appears from the papers in the cause.

at

at his pleasure. If there was no lien upon the term in the hands of the debtor, there could be no lien upon the term in the hands of his assignee (*c*).

It seems advisable to ask the vendor, or his attorney, whether there are any incumbrances which do not appear on the abstract; for if he answer in the negative, the search for judgments may be postponed until immediately before the execution of the conveyance; and if there are any judgments, and the purchase cannot be completed on that account, the purchaser can recover all his expenses from the vendor (*d*). It should seem, however, that the purchaser would equally be entitled to recover the expense of the conveyance, although he had not enquired after, or searched for incumbrances before it was prepared.

A purchaser who, at the time of his contract, is seised of the legal estate, as a mortgagee, need not search for judgments subsequently to the mortgage, for an equity of redemption is not within the clause of the statute of frauds, which will shortly come under our consideration; and it is, therefore, not extendable (*e*) (I). And as the purchaser will, by the contract, acquire equal equity with the judgment creditor, and has already got the legal estate, his title cannot be impeached. Some gentlemen of eminence

(*c*) Forth *v.* The Duke of Norfolk, 4 Madd. 503. The case is now before the Lord Chancellor on appeal.

(*d*) Richards *v.* Barton, 1 Esp. Ca. 268; *vide supra*, ch. 4.

(*e*) Lyster *v.* Dolland, 1 Ves. jun. 431; 3 Bro. C. C. 478; and see Burdon *v.* Kennedy, 3 Atk. 739; Scott *v.* Scholey, 8 East, 467; Metcalf *v.* Scholey, 2 New Rep. 461.

(I) *Note.* An equity of redemption has been held to be assets under the statute of frauds, 2 Freem. 115, pl. 130; although the determination appears not to have been acted upon. It were much easier to maintain that an equity of redemption is extendable under the statute.—*Note*, the case of Freeman *v.* Taylor, 3 Keb. 307, was before the statute.

even

even hold, that notice of judgments entered up *subsequently to the mortgage* will not affect the purchaser; but it is conceived, that if he purchase with notice, either express or implied, of any judgment, the legal estate will not protect him in equity against the judgment creditor. The judgment is a lien upon the estate in equity (*f*), and confers a right on the creditor to redeem a prior mortgage or other incumbrance (*g*). And by the first principles of equity, a purchaser, with notice of any incumbrance, is bound by it in the same manner as the person was of whom he purchased (*h*). And, indeed, it has been expressly decided, that a mortgagee, purchasing the equity of redemption, is bound by judgments of which he has notice, although they were entered up subsequently to the mortgage (*i*).

This doctrine prevailed before the statute of frauds, and has been the observed rule of equity ever since; and it is said, that previously to the statute of frauds, a judgment creditor was in like manner, and upon the same principles, relievable in equity against *a conveyance to trustees*. And by the tenth section of that statute it is enacted, that execution may be delivered upon any judgment, statute, or recognizance, of all such lands, &c. as any other person or persons shall be seised or possessed of in trust for him against whom execution is so sued, in the same manner as if he had been seised of such lands, &c. of such estate as they be seised of in trust for him *at the time of the execution sued*, and shall be held discharged of the incumbrances of the trustee. Upon the construction of this statute it hath been holden, that if a trustee has conveyed

(*f*) Churchill *v.* Grove, Nels. Cha. Rep. 89; 1 Cha. Ca. 35.

(*g*) See 2 Cha. Rep. 180.

(*h*) See Anon. 2 Ventr. 361, No. 2.

(*i*) Greswold *v.* Marsham, 2 Cha. Ca. 170; Crisp *v.* Heath, 7 Vin. Abr. 52, (E.) pl. 2.

the

the lands before execution sued, though he was seised in trust for the defendant at the time of the judgment, the lands cannot be taken in execution (*j*). Now it is clear, that where the fee is in trustees, the purchaser would not be bound by any judgment, upon which no writ of execution had been sued, and of which he had not notice. But here, as in the preceding case, the purchaser, it is contended in practice, cannot be advised to rely on the legal estate in the trustees, where he has notice of any subsequent judgments. Mr. Powell (*k*), however, entertained a contrary opinion. After showing that trust estates can only be taken in execution by virtue of the statute of frauds, he contends, that where the legal estate is in a trustee, *notice* to a purchaser of judgments is immaterial, because the lands are not liable at law; and, as *equity follows the law*, no relief would be granted against the purchaser, through the medium of a court of equity.

If the case of Hunt *v.* Coles be an authority, it must be acknowledged that trust-estates cannot be affected by any execution sued upon a judgment after the trustee has conveyed away the lands. But admitting, that before the statute of frauds, an incumbrancer might be relieved against a conveyance to trustees, it should seem to follow, that the same equity must still be administered. It were difficult to successfully contend, that the statute has concluded the equitable relief. The registering acts expressly enact, that a purchaser shall not be bound by instruments, &c. unless they are registered, notwithstanding which equity will fasten on the conscience of a purchaser who bought with notice of any unregistered incumbrance; and there is surely greater reason to hold, that the jurisdiction of equity shall not be barred by a statute which merely

(*j*) Hunt *v.* Coles, Com. 226. See Higgins *v.* The York Buildings Company, 2 Atk. 107.

(*k*) 2 Mort. 4th edit. p. 608.

gives

gives a partial remedy at law without interfering with the equitable rights of the parties.

The difficulty in the way of the relief would be, that no case can be found, after the most diligent search, in which a judgment creditor has been relieved against a conveyance to trustees, where a purchaser had subsequently acquired the legal estate. The author formerly thought that equity would relieve against the purchaser, if he bought with notice; but his confidence in that opinion has been shaken by the want of authority in support of it. Nothing but a judicial determination can set the doubt on this point at rest.

The statute only extends to clear and simple trusts for the benefit of the debtor. Therefore a trustee of a term of years for securing an annuity, and subject thereto for the grantor, is not a trustee within the statute (*l*).

Where, however, an estate is conveyed to trustees upon trust to sell, and pay debts, &c. and to pay the surplus of the monies to arise by sale to the grantor, and the receipts of the trustees are made sufficient discharges to the purchasers; the better opinion is, that the purchaser is not bound by any subsequent judgments of which he has even express notice. Great difference of opinion has prevailed in the profession on this point. Those who hold that a purchaser is bound by such judgments, rightly compare the interest of the grantor in the estate to an equity of redemption. But as such an interest is not extendable, the debt of the judgment creditor can only, it should seem, affect the surplus monies in the hands of the trustees, and is not a lien on the estate itself. When the receipts of the trustees are once made a discharge to the purchaser, there surely is not any equity in a subsequent incumbrancer to require the purchaser to see to the appli-

(*l*) Doe *v.* Greenhill, 4 Barn. & Ald. 684.

cation

tion of any part of the money. The creditor stands, as his debt, in the place of his debtor, and consequently entitled to have his debt discharged out of the surplus nies in the hands of the trustees; but he cannot, it is nceived, claim a higher equity; the contrary rule would productive of infinite inconvenience.

As a mortgagee, seised or possessed of a legal estate, ed not search for judgments; so a purchaser, who ob- ns an assignment of a legal subsisting term of years in st to attend the inheritance, may dispense with a rch for judgments, &c. if he be assured that notice any incumbrance cannot be proved on him or any of agents. But as notice may be inferred from very ght circumstances, a purchaser cannot be advised in y case, or under any circumstances, to dispense with e usual searches. And even where he does rely on a m of years, yet if it be recently created, incumbrances ould be searched for previously to the creation of the m.

It is, I believe, usual to search for judgments against a ndor, only from the time he purchased the estate; but is practice is not correct, because judgments bind after- rchased lands, and will consequently affect such lands en in the hands of a purchaser (*m*).

Judgments do not, it seems, bind leasehold estates till its of execution are taken out upon them, and delivered the sheriff (*n*). And yet, upon purchase of a leasehold tate, judgments must be searched for; because the sheriff ill not permit his office to be searched for any writ of

(*m*) See Sir John de Moleyn's se, 30 E. 324, a; 1 Ro. Abr. 2, pl. 14. 16; 42 E. 3. 11, a; Ass. pl. 17; 2 H. 4. 8, b. pl. ; 14, a. pl. 5; 2 Ro. Abr. 472, .) pl. 3.; Shep. Prac. Couns. 305; Hickford v. Machin, Winch, 84, *per* Jones, J.; and Brace v. Duchess of Marlborough, in 2d Resol. 2 P. Wms. 492.

(*n*) *Vide post*, ch. 16.

execution

execution which may have been delivered there, lest the purposes of the writ should be defeated by the party against whom it is issued absconding, or removing his goods. Therefore, although the judgment will not of itself bind the leasehold estate, yet the purchaser cannot safely complete his contract, where he discovers a judgment, because he cannot be satisfied that an execution issued upon it has not been lodged with the sheriff. When we consider how many valuable leasehold estates are daily brought into the market, we shall perhaps think that the legislature would do well to enact, that writs of execution *intended to bind leasehold estates* shall be docketed in like manner as judgments, and that where the estate lies in a register county, they shall be registered.

Where only an equity of redemption of a term is purchased, the purchaser will not be affected by even an execution lodged, of which he had not notice, for such an interest is not extendable under the statute of frauds, and certainly the mere delivery of the writ to the sheriff would not be implied notice to a purchaser (*o*).

These observations, respecting judgments, must not be closed without observing, that if a person purchase part of an estate subject to a judgment, and the residue of the estate remain in the hands of the conusor, or descend to his heir, and execution is sued only against the original debtor or his heir, he shall not have contribution against the purchaser, and the consideration of the purchase is not material in these cases. But if execution be sued against the purchaser only, he shall have contribution against the persons seised of the residue of the estate, whether they acquired it by descent or purchase (*p*).

(*o*) See 1 Ves. jun. 431; 3 Atk. 739.

(*p*) Sir William Herbert's case, 3 Co. 11, b. See the distinctions taken in Blakeston v. Martyn, 1 Jo. 90.

Sir

Sir Edward Coke observes (*q*), that when it is said, hat if one purchaser be only extended for the whole debt hat he shall have contribution; it is not thereby inended that the others shall give or allow to him any hing by way of contribution; but it ought to be intended, hat the party who is only extended for the whole, may, y *audita querela*, or *scire facias*, as the case requires, efeat the execution, and compel the conusor to sue exeution of the whole land; so, in this manner, every one hall be contributory, *hoc est*, the land of every terre-tenant hall be equally extended.

II. To resume the consideration of the cases in which ncumbrances should be searched for:

If the estate lie in a register county (I), the register's ffice should be searched, for the purpose of ascertaining ot only that the estate is free from incumbrances, but lso, that the title-deeds are duly registered;—the estate ay be lost by neglecting to do so. And if it appear that ny deed has not been duly registered, the vendor must rocure it to be registered at his own expense, previously o the completion of the contract; although, indeed, it ometimes happens that an instrument not being registered, revents an objection being made to the title. To give n instance of this, let us suppose a man to have mortaged his estate, and paid off the money, but to have negected to take a reconveyance. Now, in this case, if the ortgage was not registered, the purchaser need not inist upon its being registered, and require a reconveyance om the mortgagee, because, as the deed was not regis-

(*q*) 3 Co. 14, b.

(I) For some observations on the registry acts, see *infra*, ch. 16.

 tered,

tered, the mortgagee did not acquire the legal estate, or if he did would cease to have it by the registry of the conveyance to the purchaser; and, being paid off, he has of course no equity. So, where a partial interest in an estate is devised to the heir at law, with a power of leasing, and he grant a lease not authorized by his power, the lease may, in some cases, be sustained both at law and in equity, in case the will was not registered according to the act. This, however, is a mode of making a title to which necessity only should compel us to resort.

It is very seldom that wills are registered; but a purchaser from a devisee should not complete his contract till the will is duly registered; for should any person purchase of the heir at law *bonâ fide*, and without notice of the will, and register his conveyance before the registry of the will, he would be preferred to the purchaser from the devisee (*r*).

But if the vendor be both heir at law and devisee, the non-registry of the will is immaterial; for if he sell to any subsequent purchaser, it must be either in the character of heir at law, or in the character of devisee. If he sell in this character, the second purchaser must have notice of the will; if he contract in that, the first purchaser has already procured the legal estate.

So it seems clear, that if the vendor claim a leasehold estate, either as executor or legatee, the purchaser need not insist upon the testator's will being registered, because no subsequent purchaser can procure a title without notice of the will; and it may be remarked, that letters of administration are never registered, and they seem to stand upon the same principle as wills of leasehold estates.

If a purchaser be already seised of the legal estate, as if he be mortgagee in fee, and has contracted for the

(*r*) See Jolland *v.* Stainbridge, 3 Ves. jun. 478.

equity

uity of redemption, it is not actually necessary to search
s register if he be assured that notice cannot be proved
her on himself, or on any one concerned for him; be-
use the mere registration of deeds, as we shall hereafter
, is not notice to a purchaser seised of the legal estate
eviously to the purchase, and he will, therefore, be en-
led to hold against any *puisne* incumbrance of which
had not notice.

Where the estate lies in the county of Middlesex, judg-
nts need only be searched for at the register's office,
judgments bind estates in that county only from the
e they are memorialized; but this is not the case in the
nty of York; for in the North Riding, any judgment
istered within twenty days after the acknowledgment
signing of it, is available in the same manner as if it
d been registered on the day it was acknowledged or
ned (*s*); and in the East and West Ridings, and in
ngston upon Hull, thirty days are allowed for the re-
tering of judgments (*t*). Therefore, where the estate
in York, or Kingston upon Hull, recent judgments
st be searched for in the proper courts.

It has already been observed, that judgments do not
d leasehold estates till delivery of a writ of execution
the sheriff. Writs of execution upon judgments in-
ded to affect leasehold estates in a register county,
re formerly never registered (*u*). From the present
ctice of registering writs of execution, it may perhaps
concluded that they ought to be registered; but the
istry of them seems *casus omissus* out of the statutes
registry; and therefore, upon the purchase of a lease-
d estate in a register county, not only the register, but
the proper courts, should be searched.

(*s*) 8 Geo. II. c. 6. s. 33. c. 35. s. 28.
(*t*) 5 Anne, c. 18. s. 11; 6 Anne, (*u*) *Vide infra*, ch. 16.

The register ought to be searched immediately before the execution of the conveyance, for the same reason that the search for judgments should be delayed till the last moment.

And lastly, since grants of annuities have become so prevalent, and can be searched for, it is the duty of the purchaser's solicitor to search for annuities. In a register county they need only be searched for at the register's office.

It may be useful to observe, that if a purchaser is damnified by his solicitor neglecting to search for incumbrances, it is clear that he may recover at law against the solicitor, for any loss occasioned by his negligence (*v*). But an attorney's negligence cannot, perhaps, in any case, be set up as a defence to an action by him for the business done, although it should seem that if there is a cross-action by the client against the attorney, the Court will, upon application, stay the execution in the action by the attorney pending the other (*w*).

So if the chief clerk, whose duty it is to enter up and docket judgments, neglect to do so, by which a purchaser, who has made the proper searches, sustains any loss, he, the purchaser, has a remedy against the clerk by an action on the case (*x*). And any person who is damnified by the neglect of the register of either of the registering counties, may bring an action against him, in which he will recover treble damages and costs of suit, by virtue of the registering acts (I).

(*v*) Brooks *v.* Day, 2 Dick. 572; Forshall *v.* Coles, 7 Vin. Abr. 54, pl. 6. MS.; and Appendix, No. 19; Green *v.* Jackson, Peake's Ca. 236. See Baikie *v.* Chandless, 3 Camp. Ca. 17.

(*w*) Templer *v.* M'Lachlan, 2 New Rep. 136.

(*x*) Douglas *v.* Yallop, 2 Burr. 722.

(I) By the registering acts for Scotland, the remedy is extended against the heirs of the clerk, although no action shall have been commenced in the clerk's life-time. 1 Ersk. Inst. B. II. T. III. s. 42.

SECTION VI.

Of Relief from Incumbrances.

HAVING considered in what instances incumbrances should be searched for, let us now inquire, 1st, In what cases a purchaser may detain the purchase money, if incumbrances are discovered previously to the payment of it: and 2dly, To what relief he is entitled, if evicted after the money is actually paid; and these inquiries will involve the consideration of the cases in which a purchaser will be relieved in respect of defects in the title to the estate.

I. First then, 1. Where an incumbrance is discovered previously to the execution of the conveyance, and payment of the purchase money, the vendor must discharge it, whether he has or has not agreed to covenant against incumbrances, before he can compel payment of the purchase money (*y*).

2. But if a purchaser, before executing the articles, has notice of an incumbrance *which is contingent*, and it is by the articles agreed that the vendor shall covenant agains incumbrances, the purchaser has entered into them with his eyes open, has chosen his own remedy, and equity will not assist him (*z*); and he cannot, therefore, detain any part of the purchase money.

(*y*) Anon. 2 Freem. 106; Vane v. Lord Barnard, Gilb. Eq. Rep. 6; Maynard's case, 2 Freem. 1; and see 1 Ves. 88; 2 Ves. 394; 2 Ves. jun. 441; and 4 Bro. C. C. 394.

(*z*) Vane *v.* Lord Barnard, *ubi sup.*

II. 1. Although the purchaser has paid the money, yet if he is evicted before any conveyance is prepared and executed, or before the conveyance is executed by *all* the necessary parties, he may recover the purchase money in an action for money had and received, although the intended covenants do not extend to the title under which the estate was recovered, and he may have taken possession of the estate (*a*) (I).

2. But if the conveyance has been actually executed by *all* the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase money either at law (*b*) or in equity (*c*).

Thus, where (*d*) *A* bought an estate, to one moiety of which there was a clear defect of title, which his counsel had overlooked, and he was afterwards evicted; he filed a bill asserting his claim to be repaid a moiety of the purchase money, although the covenants for title did not extend to the eviction, but the bill was dismissed (II).

The

(*a*) Cripps *v.* Reade, 6 Term Rep. 606; Matthews *v.* Hollings, Woodfall's Law Land. 35, cited; Johnson *v.* Johnson, 3 Bos. and Pull. 162; and see Awbry *v.* Keen, 1 Vern. 472; and see Brig's case, Palm. 364; Simmons *v.* Hunt, 1 Marsh. 155; Jones *v.* Ryde, 5 Taunt. 488.

(*b*) See Cripps *v.* Reade; Johnson *v.* Johnson; and Bree *v.* Holbech, Dougl. 654.

(*c*) Serjeant Maynard's case, 2 Freem. 1; Anon. 2 Freem. 106.

(*d*) See 3 Ves. jun. 235; and see 2 Bos. and Pull. 23.

(I) In Robinson *v.* Anderton, Peake's Ca. 94, Lord Kenyon permitted a purchaser of *fixtures* in a house which were scheduled in the original lease, and belonged to the landlord, to recover the purchase money, although the person who sold them was an under tenant, *and had himself ignorantly paid for the fixtures.*

(II) In the second vol. of Coll. of Decis. p. 517, 518, a case to the same effect is reported.—Lands which were sold with the warrandice from fact

and

The facts of this case were as follow: William Davy devised the estate in question to Sir Robert Ladbroke and Lyde Brown, as tenants in common, in fee; and gave all the residue of his real estate to his brother William Pate in fee. Sir Robert Ladbroke died in the testator's life-time. Robert Pate, as devisee of William Pate, the residuary devisee, conceived himself to be entitled to the moiety devised to Sir Robert Ladbroke, which became lapsed by his death, in the testator's life-time (I); and accordingly Robert Pate joined with the persons entitled to the moiety devised to Lyde Brown, in selling the estate to one Urmston. *The conveyance recited the will of William Davy, and all the subsequent instruments*, and a covenant was inserted for the title, notwithstanding any act done by Robert Pate, or his ancestors, or any person claiming under him or them. The purchaser finding Robert Pate had no title to the moiety over which he assumed a power of disposition, but that it had descended to the heir at law of William Davy, filed his bill, praying that the purchase money might be restored to him. Robert Pate,

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and deed allenarly, being evicted, but not through default of the disposer, the purchaser brought an action not upon the warrandice, which was not incurred, but upon this ground of equity, that if he has lost the land, he ought at least to have repetition of the price. It was answered, that when one sells with warrandice from fact and deed, the intention is not to sell the subject absolutely, which would be the same as selling it with absolute warrandice, but only to sell it so as the seller himself has it, that is, to sell what title and interest he has in the subject: the purchaser takes upon himself all other hazards; and, therefore, if eviction happen otherwise than through the fact and deed in the disponer, he bears the loss. The Lords assoilzed. Craig v. Hopkins.

(I) The mistake arose from the case of lapse being considered the same in regard to real and personal estate: in the case of personal estate lapsed legacies fall into the residue; but where a real estate lapses, it descends to the heir at law, and does not pass to the residuary devisee.

the vendor, demurred to the bill for want of equity, and the demurrer was allowed (*e*).

So if a purchaser neglect to look into the title, it will be considered as his own folly, and he can have no relief. It has even been laid down, that if one sells another's estate without covenant or warranty for the enjoyment, it is at the peril of him who buys, because the thing being in the realty, he might have looked into the title, and there is no reason he should have an action by the law where he did not provide for himself (*f*). But it may here be remarked, that by the 32 H. 8, c. 9, no person must either buy or sell any pretended title unless the seller or the persons from whom he claims have been in possession of the estate or of the reversion thereof, or taken the rents thereof for a year before the sale, unless the purchaser is in lawful possession, in which case he may buy in any pretended right; and he will not in any case be affected, unless he bought with notice (*g*).

In a late case the statute was pleaded with effect (*h*). In a recent instance this statute was actually pleaded to a bill for a specific performance, on the ground that the plaintiff himself was only entitled under an agreement for purchase of the estate; but there was no foundation whatever for this defence. It is perfectly clear that the statute does not apply to such a case. The sale is not of a pretended right or title, but of the estate in fee-simple in possession, subject certainly to the decision of a court of

(*e*) Urmston *v.* Pate, Chan. 1st Nov. 1794, cited in 1 Trea. Eq. 364, n. and stated in 4 Cruise's Digest, 90, s. 64.

(*f*) Roswell *v.* Vaughan, 2 Cro. 196; Lysney *v.* Selby, 2 Lord Raym. 1118; Goodtitle *v.* Morgan, 1 Term Rep. 755; and see Anon. 2 Freem. 106; and see and consider Hitchcock *v.* Giddings, 4 Price, 135.

(*g*) See 4 Rep. 26, a; Bac. Abr. tit. Maintenance, (E.)

(*h*) Hitchins *v.* Lander, Cowp. 34.

equity

equity upon the right to a specific performance. There are similar cases now in court, and one particularly of great magnitude, in which the sub-purchaser would be happy to avail himself of any objection to get rid of the contract, but it never before occurred to any one to plead the statute. It might with equal force be argued, that a purchaser under an agreement has not a devisable interest, for it is settled, that a mere right of entry is not devisable; and this, it may be said, is "a mere pretended right or title." The clear doctrine is, that the purchaser, from the time of the contract, is in equity the owner of the estate, and may devise, sell and dispose of it in the same manner as if the fee were actually conveyed to him, although if equity ultimately refuse a specific performance, the devise, sale or other disposition necessarily falls to the ground. In a late case the Lord Chancellor reprobated the doctrine. His Lordship held clearly, that the sale of an equitable estate under a contract was binding. It was every day's practice. Upon a sale of an interest under a contract, the seller becomes a trustee for the second purchaser, and the second purchaser is, without entering into a covenant, bound to indemnify him against any costs incurred in proceedings for his benefit. The Court not only considers it not unlawful, but compels him to permit his name to be used for the benefit of the second purchaser (*i*). This puts the point at rest.

"Where a purchaser has taken a defective title, and cannot recover against his immediate vendor, his only remedy is to have recourse to the covenants of the earlier vendors, many of which are inherent to the lands, and to some of which, as the covenant for quiet enjoyment, there is no objection, on account of their antiquity, where the breach is recent (*k*)."

(*i*) Wood v. Griffith, 12th Feb. 1818, MS.

(*k*) Butler's n. (1) to Co. Litt. 384, a.

3. It

3. It seems, that if the conveyance be actually executed, the purchaser can obtain no relief, although the money be only secured.

In an early case, however (*l*), where *A* had sold to *B* with covenants only against *A*, and all claiming by, from, or under him, *B* secured the purchase money; but before payment, the land was evicted by a title paramount to *A*'s, and Lord Chancellor Finch relieved from the payment of the purchase money.

The case, it seems, was not taken by the reporter himself, and he adds the following notes, or queries to it:

First. If declaration at the time of the purchase treated on, that there was an agreement to extend against all incumbrances, not only special, it could not have been admitted.

Secondly. The affirmative covenant is negative to what is not affirmed, and all one as if expressly declared that the vendor was not to warrant but against himself, and the vendee to pay, because absolute without condition.

Thirdly. *Quære*, If this may not be made use of to a general inconvenience, if the vendee, having all the writings, and purchase, is weary of the bargain, or in other respects sets up a title to a stranger by collusion?

Nota. In many cases it may be easily done, &c.

These remarks are unanswerable; and if the doctrine in this case were law, the consequences would be of a very serious nature; for what vendor would permit part of the purchase money to remain on mortgage of the estate, if he were liable to lose it, supposing the estate to be recovered by a person against whose acts he had not covenanted? Indeed, this point is so very differently considered in practice, that where part of the purchase-

(*l*) Anon. 2 Cha. Ca. 19; and see Fonbl. n. (*g*) to 1 Trea. Eq. 361, 2d edition.

money

money is permitted to remain on mortgage, although the covenants from the vendor be limited, the vendee invariably enters into general unlimited covenants, in the same manner as he would have done in the case of an independent mortgage.

In a case (*m*) where an estate was sold before a master, under a decree, and the purchaser under the usual order had paid his purchase money into the bank, but it was not to be paid out without notice to him, and he took possession, and approved of the title, and the conveyance to him was executed by all necessary parties; afterwards, but before the money was paid out of the bank, the tenants were served with a writ of right, at the suit of an adverse claimant; it was held, that the money must be applied under the decree. The Court having given the purchaser possession of the estate which he had purchased, and a conveyance under a title which he himself had previously approved, had done all it could for the purchaser, who could not afterwards object to the application of the purchase money.

4thly. Although the purchase money has been paid, and the conveyance is executed by all the parties, yet if the defect do not appear on the face of the title-deeds, and the vendor was aware of the defect, and concealed it from the purchaser, or suppressed the instrument by which the incumbrance was created, or on the face of which it appeared, he is in every such case guilty of a fraud (*n*), and the purchaser may either bring an action on the case, or file his bill in equity for relief.

But, as Mr. Butler remarks, a judgment obtained after the death of the seller, in an action of this nature, can

(*m*) Thomas *v.* Powell, 2 Cox, 304.

(*n*) See Harding *v.* Nelthrope, Nels. Cha. Rep. 118; and Bree *v.* Holbech, Dougl. 654, 2d edit.; and see 2 Freem. 2.

only

only charge his property as a simple contract debt, and will not, therefore, except under very particular circumstances, charge his real assets. A bill in Chancery, in most cases, will be found a better remedy: it will lead to a better discovery of the concealment, and the circumstances attending it, and may in some cases enable the Court to create a trust in favour of the injured purchaser (*o*).

Where a bill is filed against the vendor, and the Court cannot satisfy itself of the fact, an issue will be directed to try whether the vendor did know of the incumbrance (*p*).

In a late case, where the sellers knew of a defect in the title to a part of the estate, which was material to the enjoyment of the rest, and did not disclose the fact to the purchaser, and it could not be collected from the abstract, the purchaser, although he was not evicted, was relieved against the purchase in equity. The sellers were decreed to repay the purchase money, with costs, and likewise all expenses which the purchaser had been put to relative to the sale, together with an allowance for any money he laid out in repairs during the time he was in possession (*q*). This is a case of the first impression.

Although the vendor has fraudulently concealed an incumbrance, yet the purchaser has no lien on the purchase money after it is appropriated by the vendor.

Thus, in the case of Cator *v.* Earl of Pembroke (*r*), Lord Bolingbroke was tenant for life of a settled estate, with a power to sell and lay out the money arising by sale in other lands; and in the mean time to invest the same

(*o*) See Butler's n. (1) to Co. Litt. 384, a.

(*p*) Harding *v.* Nelthrope, *ubi sup.*

(*q*) Edwards *v.* M'Leay, Coop. 308; affirmed by Lord Eldon on appeal 11 July 1818, with a reservation of the question as to repairs, MS.

(*r*) Cator *v.* Earl of Pembroke, 1 Bro. C. C. 301; and see and consider 12 Ves. jun. 356. 377.

in

in the funds. Lord Bolingbroke granted life-annuities out of the estate, and then he and the trustees of the settlement sold the estate to Cator, who was ignorant of the annuities, and Lord B. covenanted that Cator should enjoy free from incumbrances. The purchase money was invested in the funds in the names of the trustees, and Lord Bolingbroke granted annuities to Boldero the banker, to the extent of the dividends; and the trustees, at the request of Lord Bolingbroke, gave Boldero an irrevocable power of attorney to receive the dividends. Cator being evicted by the grantee of the annuities charged on the estate, filed his bill, insisting that he had a lien on the purchase money invested in the funds, and was entitled to the dividends in exclusion of Boldero. The cause was first heard before the Lords Commissioners Loughborough, Ashhurst and Hotham, who thought that Cator had a lien on the dividends, but that Boldero had a preferable equity, and therefore dismissed the bill. The cause was reheard before Lord Thurlow (*s*), who affirmed the decree, and was moreover of opinion, that Cator could not follow the money when deposited with the trustees, but that having taken a covenant for quiet enjoyment and a good title, his remedy was that way.

Where a purchaser pays part of the purchase money generally to a creditor of the vendor, by judgment, or other security affecting the land, and also by bond, or other security, which does not affect the land, it will be considered as a payment in satisfaction of the judgment, or other incumbrance which charges the estate (*t*).

It may here be observed, that if a seller is bound to

(*s*) 2 Bro. C. C. 282.

(*t*) Brett *v.* Marsh, 1 Vern. 468. See Hayward *v.* Lomax, 1 Vern. 24; Peters *v.* Anderson, 5 Taunt. 596.

relieve

relieve the estate sold from incumbrances, and the purchaser buys them up, he ought not to charge more than he paid, as that is the amount of the damage which he sustains by the breach of the covenant to pay off the incumbrances (*u*).

(*u*) 2 Dow, 296.

CHAPTER X.

OF INTEREST AND COSTS.

SECTION I.

Of Interest.

[. EQUITY considers that which is agreed to be done, as actually performed; and a purchaser is therefore entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate (*a*): and as, from that time, the money belongs to the vendor, the purchaser will be compelled to pay interest for it, if it be not paid at the day (*b*).

The same rule applies to a sale of a reversion—interest must be paid from the time fixed upon for payment of the purchase money, because the wearing of the lives is equivalent to taking the profits (*c*).

This is so plain a rule, that no disputes could ever arise on it, if the purchase money were not frequently lying dead; in which case it becomes a question, whether the loss of interest shall fall on the vendor or purchaser.

(*a*) See 6 Ves. jun. 143. 352.

(*b*) See Sir James Lowther *v.* the Countess Dowager of Andover, 1 Bro. C. C. 396; and see Ves. jun. 352.

(*c*) Davy *v.* Barber, 2 Atk. 490; and see Owen *v.* Davies, 1 Ves. 82; 3 Atk. 637; *vide post* as to the sale of a reversion before a Master.

If

If the delay in completing the contract be attributable to the purchaser, he will be obliged to pay interest on the purchase money from the time the contract ought to have been carried into effect, although the purchase money has been lying ready, and without interest being made of it (*d*).

But if the delay be occasioned by the default of the vendor, and the purchase money has lain dead, the purchaser will not be obliged to pay interest (*e*). The purchaser must, however, in general give notice to the vendor that the money is lying dead (*f*); for otherwise there is no equality: the one knows the estate is producing interest, the other does not know that the money does not produce interest (*g*). Wherever, therefore, a purchaser is delayed as to the title, and means to insist upon this, he ought to apprise the other party that he is making no interest. But even if a purchaser gave such notice, yet if it appears that the money was not actually and *bonâ fide* appropriated for the purchase, or that the purchaser derived the least advantage from it, or in any manner made use of it, the Court would compel him to pay interest.

If no time be limited for performance of the agreement, and the purchaser be let into possession of the estate, he must pay interest on the purchase money from that time (*h*).

It cannot, however, be laid down as a general rule, that a purchaser of estates under a private agreement shall, from the time of taking possession, pay interest. At any rate, although the conveyance be executed, yet he shall not pay interest but from the time of taking possession,

(*d*) Calcraft v. Roebuck, 1 Ves. jun. 221.

(*e*) Howland v. Morris, 1 Cox, 59.

(*f*) Calcraft v. Roebuck, *ubi sup.*; and see Roberts v. Massey, 13 Ves. jun. 561.

(*g*) Powel v. Martyr, 8 Ves. jun. 146. See Comer v. Walkley, *post*.

(*h*) See *ex parte* Manning, 2 P. Wms. 410.

prevented from so doing by the vendor (*i*). But be a strong case, and clearly made out, in which l not pay interest where he has received the rents ofits (*k*).

, in Comer *v.* Walkley (*l*), the purchaser had been ession of the estate about twenty-two years, with- conveyance having been executed; and he had d the purchase money. The delay was not attri- to him, and he stated that his money had been ady from the time of the contract, without interest ade by it, as he was in daily expectation of being pon for payment of it; and therefore he insisted ought not to be compelled to pay interest. Lord , however, decreed, that he should pay interest per cent. from the time he entered into possession ine he paid the purchase money into the Bank by er of the Court.

in a very late case, where a particular day was ap- by the agreement for payment of the money, and chaser was to have a conveyance on payment of it; chaser entered before the conveyance was executed; er a delay of several years, during which he had d the rents, being called upon to pay the purchase *with interest*, he resisted the demand of interest; answer to a bill filed against him, it was insisted, erest was not payable, as the money was to be paid vent depending upon an act to be done by the (namely, the execution of the conveyance) form- ndition precedent to the payment of the purchase But the late Master of the Rolls, after observing e purchaser did not allege that any circumstances

r Lord Hardwicke, in Blount, 3 Atk. 636.

e 8 Ves. jun. 148, 149.

(*l*) Reg. Lib. A. 1784, fo. 625; Smith *v.* Skelton, Reg. Lib. B. 1799, fol. 807.

had occurred entitling him to relinquish the contract, said, that the act of taking possession was an implied agreement to pay interest; for so absurd an agreement as that the purchaser was to receive the rents and profits to which he had no legal title, and the vendor was not to have interest, as he had no legal title to the money, could never be implied (*m*).

If it be agreed that the purchaser shall take possession of the estate, and pay interest on the purchase money from that time, and it afterwards appear that a long time must elapse before a title can be made, the purchaser will be entitled to rescind the agreement.

But if the purchaser acquiesce in the delay until the contract is nearly carried into execution, he cannot then appropriate the purchase money; and, by giving notice of that circumstance to the vendor, discharge himself from the payment of interest.

Thus, in Dickenson *v.* Heron (*n*), after the execution of a contract for purchase of an estate, it appeared that an act of parliament was necessary to perfect the title, and that some time must elapse before a title could be made; and it was therefore agreed that the purchaser should take possession of the estate, and pay interest on the purchase money. Great delays having arisen, and the purchaser thinking exchequer bills, in which the purchase money was invested, not safe, he sold them, and gave notice to the vendor that the money was lying ready, and without interest being made of it. After the purchase was completed, and the money paid, the vendor filed a bill, asserting his right to interest until the execution of the conveyance.

The cause was heard before the late Master of the

(*m*) Fludyer *v.* Cocker, 12 Ves. jun. 25.

(*n*) Rolls, 16th March 1804, MS. See Fludyer *v.* Cocker, *supra*.

Rolls,

Rolls, who pronounced the following judgment:—" An agreement of this nature is totally independent of the interest made by the money. When a purchaser is let into possession, the vendor need not mind what is done with the purchase money, because the purchaser agrees to pay interest for the money. And such an agreement can only be affected by great delay, because the purchaser is not to be kept for ever bound by a disadvantageous bargain; for the interest might be better than the rents; in which case, if the purchaser was to be bound, notwithstanding an unreasonable delay, the vendor would not mind how long he delayed making a title. If the objection had been taken at a different time, it would have been better. He should have made the objection when he knew that an act of parliament was necessary, as he was not before in possession of that fact. But he waved his delay, and he consents to continue to pay interest, and writes a letter which clearly implies that; or he might have waved the agreement. Afterwards he thinks he is entitled to say, that he will not pay interest. The ground was totally distinct. He had laid out his money in exchequer bills, and then, upon a supposition that they were not safe, he sold out, and then gave notice that he should not pay interest. He ought certainly to have given notice before he sold out; and to have given the vendor an option, whether he would choose them to remain at his risk, or would wave his interest. This ground was, however, nothing to the vendor, as he had nothing to do with the interest. The only ground upon which he could have waved the agreement, was the delay in the first instance. The defendant mistook his case; he might have done at an earlier period, and insisted not to pay interest; for a court would not have held him to an indefinite period. Besides, the notice was not given until a long

delay could not take place." And the Master of the Rolls for these reasons, decreed the purchaser to pay interest; but, as he bound himself by his long acquiescence, his Honor would not give costs, and interest was only given up to the time the conveyance was delivered to the vendor's attorney for execution, although it was not executed until three months afterwards.

In the case of timber on an estate to be taken at a valuation, interest on the purchase money will only commence from the valuation, although the interest on the purchase money for the estate itself may be carried a great way back, because surveyors always value timber according to its present state; and the augmented value of the timber by growth, is an equivalent for the interest from the time of the contract to the making of the valuation (*o*).

Upon the sale of an estate in possession, under the order of a court of equity, the rule is, that the purchaser is entitled to the possession or rents from the quarter-day preceding his purchase, paying his money before the following one (*p*).

Where a reversion is sold under the order of a court of equity, it seems that interest must be paid from the very day upon which the purchaser could have confirmed the report of his being the best bidder; because, from that time, the purchaser is sure of his title and of his purchase; the estate is bound, and the party who is to convey becomes but a trustee for the purchaser, who ought to have his money ready (*q*). And the same rule applies to an

(*o*) Waldron *v.* Forester, Exchequ. June 30, 1807, MS. *Vide infra.*

(*p*) *Supra*, p. 52. See Mackpell *v.* Hunt, 2 Mad. 34, n.

(*q*) *Ex parte* Manning, 2 P. Wms. 412; Child *v.* Lord Abingdon, 1 Ves. jun. 94; Twigg *v.* Fifield, 13 Ves. jun. 517; but see Davy *v.* Barber, 2 Atk. 489; Blount *v.* Blount, 3 Atk. 636; Growrock *v.* Smith, 3 Anstr. 877

annuity,

annuity, from which time only the purchaser is entitled to receive the annuity (*r*).

Formerly the practice seems to have been, where estates for life dropped in between a person being reported the best purchaser, before a Master, and his taking possession, to direct the purchaser to make some compensation in consideration of the estate being bettered, or otherwise to go before a Master again, and the estate to be put up for a new bidding (*s*), but the rule is now settled as above stated, and the purchaser, from the time the report is or might be confirmed, is entitled to any benefit by the dropping of lives or the like.

If, subsequently to a written contract, an agreement be made, that the purchaser shall pay interest on the purchase money from a particular time, and the agreement is reduced into writing, but signed by the vendor only; yet, if the contract has been in part performed, the purchaser will be bound by the subsequent agreement (*t*).

Where a leasehold estate is sold, and possession is not delivered to the purchaser, if any delay occurs, as it would not be just to make the purchaser pay the whole purchase money, after part of the term is elapsed, without his having derived any benefit from the estate, the Court will compel the vendor to pay a rent in respect of his occupation of the estate: and the purchaser to pay interest on the purchase money during the delay (*u*).

If a tenant for years, at a rent, with an option to purchase the fee, declared his option, he is entitled to retain the rent from that time, and in lieu of it must be charged with interest upon his purchase money (*x*).

(*r*) Twigg *v.* Fifield, 13 Ves. jun. 517.

(*s*) Blount *v.* Blount, 3 Atk. 636. See Davy *v.* Barber, 2 Atk. 489.

(*t*) Owen *v.* Davies, 1 Ves. 82.

(*u*) Dyer *v.* Hargrave, 10 Ves. jun. 505.

(*x*) Townley *v.* Bedwell, 14 Ves. 591.

And where a purchaser has not been in possession of the estate and the seller receives interest, he will be compelled to pay not only the rent which he has received, but that which without his wilful default he might have received (*y*).

In a late case where the contract had been delayed upwards of fifteen years, by the default of the seller, who had received one-third of the purchase money, and also all the rents of the estate, the present Master of the Rolls compelled the seller to account not only for the rents, but for interest at four per cent. upon one-third of them (*z*).

The purchaser never pays interest on the deposit, although by his default the seller may have been prevented from receiving it from the auctioneer (*a*).

It frequently happens, that part of the purchase money is left in the hands of the purchaser, for the purpose of paying off incumbrances at some distant period; and, in that case, the purchaser must pay interest for it to the vendor (*b*).

In Comer *v.* Walkley (*c*), it appeared, that a sum was left in the purchaser's hands, at interest, as an indemnity against an incumbrance. The purchaser afterwards paid part of the sum to the vendor; notwithstanding which, the purchaser and his devisees continued to pay interest on the whole for many years. A bill was at length filed to compel payment of the residue of the sum deposited; and

(*y*) Acland *v.* Gaisford, 2 Mer. 28; Wilson *v.* Clapham, MS.; 1 Jac. and Walk. 36. S. C.

(*z*) Burton *v.* Todd, Todd v. Gee, 31 Mar. 1818, MS. Appendix, No. 20. See Lacon *v.* Mertins, 3 Atk. 1; 12 Ves. jun. 28; Wilde *v.* Fort, 4 Taunt. 334.

(*a*) Bridges *v.* Robinson, 3 Mer. 694.

(*b*) Hughes *v.* Kearney, 1 Sch. and Lef. 132.

(*c*) Reg. Lib. A. 1764, fo. 685.

the

the mistake being admitted, the Master was directed to take annual rests of the over-payments, and to compute interest thereon at five per cent. and the amount of the over-payment and interest to be deducted from the sum which would be found due from the purchaser.

Where a purchaser is entitled to recover at law a deposit paid by him to the vendor, he can also recover interest on it from the time it was paid, without an express agreement.

But where he proceeds against the auctioneer to whom the deposit was paid, he cannot recover interest unless under particular circumstances; *e. g.* if, when the title is made out, the auctioneer was called upon to pay it over, and refused, he might be liable from that time, or perhaps if he actually made interest of the deposit (*d*). An auctioneer ought not to be liable generally to interest: for an auctioneer is bound to keep a deposit till the execution of the contract, as a banker or depositary of it: for which reason it seems doubtful whether, if he actually made interest of it, he ought to be compelled to pay interest (*e*).

If interest be recovered against an auctioneer, and he himself be not in fault, he may recover it from the vendor (*f*).

And where the purchaser recovers the deposit only from the auctioneer, he may, in an action against the seller, recover interest on it, and the expenses of investigating the title, under an averment of special damage (*g*).

(*d*) Farquhar *v.* Farley, 7 Taunt. 592; Lee *v.* Munn, 8 Taunt. 45.

(*e*) See Lord Salisbury *v.* Wilkenson, 8 Ves. jun. 48; and 3 Bro. C. C. 44; 14 Ves. jun. 509, cited. See also Browne *v.* Southhouse, 3 Bro. C. C. 107; *sed vide* Willis *v.* the Commissioners of Appeals in Prize Cause, 5 East, 22.

(*f*) See Spurrier *v.* Elderton, 5 Esp. Ca. 1. As to interest where the action is for money had and received, *vide sup.* p. 214.

(*g*) Farquhar *v.* Farley, 7 Taunt. 592.

If a vendor cannot make a good title, and the purchaser's money has been lying ready, without interest being made by it, the vendor must pay interest to the purchaser (*h*).

Thus the law seemed to stand upon the decided cases, and the practice appeared to be conformable to it. But in consequence of some *general* rules as to interest, which were laid down by Lord Ellenborough, in some late cases at *nisi prius*, it was thought, by some, that interest could not be recovered in many cases in which it had formerly been obtained (*i*). These rules, however, were not intended to embrace every possible case; for it was not denied that interest may be recovered upon an *implied* contract for payment of it (*j*); and, accordingly, in a late case before Lord Ellenborough at *nisi prius*, where the title was bad, and the purchaser, in his action for recovery of the deposit, declared specially, and alleged by way of special damage, that by reason of a good title not being made, he had lost and been deprived of the use of the money which he had deposited, according to the conditions of sale, Lord Ellenborough said, that they had lately held that interest was not recoverable on money lent without some evidence of a contract for that purpose; but he thought that the plaintiff, in the case before him, ought to be allowed interest, as special damage from the day when the purchase ought to have been completed. He averred in his declaration, that by the defendant's breach of contract he had since lost the use of his money, and he had proved that averment. There seemed to be no reason, therefore, why this loss should not be compensated to him by the allowance of interest on his de-

(*h*) Fleureau *v.* Thornhill, 2 Black. 1078.

(*i*) De Havilland *v.* Bowerbank; Crockford *v.* Winter, 1 Camp. Ca. 50. 124; De Bernales *v.* Fuller, 2 Camp. Ca. 426.

(*j*) Calton *v.* Bragg, 15 East, 213.

posit,

posit, and the purchaser had a verdict accordingly (*k*). Mansfield, C. J. however, lately ruled otherwise at *nisi prius* (*l*); but Lord Ellenborough's decision agrees with the general practice of the profession, and has been since followed by the Court of Common Pleas (*m*).

Where the biddings before a Master are opened, the purchaser will be allowed interest at the rate of 4 *per cent. per annum*, on such part of the purchase monies as the Master shall find to have lain dead (*n*).

Where a purchase by a trustee is set aside, and the estate restored to the *cestui que trust*, the purchaser is allowed interest on the money paid by him, and is compelled to pay a rent for the estate during his enjoyment of it (*o*).

But where a sale is annulled on account of notice in the purchaser, of a prior claim, and he is decreed to account for the rents, it seems that he shall not be charged with interest on the rents (*p*).

An agreement, that if the purchase money be not paid at the time stipulated, the purchaser shall pay a rent for the estate, exceeding the legal interest of the money, is not usurious (*q*).

II. Where interest is recovered at law, it is always at the rate of 5 *per cent.* but in equity the rate of interest allowed is 4 *per cent.* (*r*).

In

(*k*) De Bernales *v.* Wood, 3 Camp. Ca. 258.

(*l*) Wilde *v.* Fort, 4 Taunt. 334. See Maberley *v.* Robins, 1 Marsh. 258; 5 Taunt. 625.

(*m*) Farquhar *v.* Farley, 7 Taunt. 592.

(*n*) This was directed on opening the biddings for General Birch's estate, MS.

(*o*) *Infra*, ch. 14.

(*p*) Macartney *v.* Blackwood, Irish Term Rep. 602.

(*q*) Spurrier *v.* Mayoss, 1 Ves. jun. 527; 4 Bro. C. C. 28.

(*r*) Calcraft *v.* Roebuck, 1 Ves. jun. 221; Child *v.* Lord Abingdon, 1 Ves. jun. 94; Comer *v.* Walkley, Reg. Lib. A. 1784, fo. 625; Pollexfen *v.* Moore, Reg.

In Blount *v.* Blount (*s*), Lord Hardwicke said, the Court would give such interest as was agreeable to the nature of the land purchased; but this seems never to be taken into consideration, nor indeed ought it to be; interest being given not so much on account of the profits of the estate, as the unjust detention of the purchase money.

In Dickenson *v.* Heron (*t*), at the time the purchaser took possession of the estate, it was agreed he should pay interest on the purchase money, but no rate was fixed. The purchase money, however, then produced 5 *per cent.* and it was understood between the parties that interest was to be paid at that rate; and although this understanding did not appear by any note or writing, the purchaser was decreed to pay interest at 5 *per cent.*

And in a late case in the Court of Exchequer, it appeared that one tenant in common had sold his share *of* the estate, and of the timber, to the other, who was *let* into possession, but no stipulation was made as to interest. The purchase money was not paid. A bill was filed by the vendor for a specific performance, and a motion was made that the purchase money might be paid into Court, or a receiver appointed of the estate sold. And it was accordingly referred to the Master to appoint a receiver, who was directed to pay to the vendor, out of the rents, "interest after the rate of 5 *per centum per annum*, upon the amount of the purchase money, and the value of the timber on the estate (*u*)." This cause afterwards came to a hearing,

Lib. B. 1745, fo. 283, at the bottom; Smith *v.* Hibbard, Chanc. 11 July 1789; M'Queen *v.* Farquhar, Lib. Reg. B. 1804, fol. 1095; Browne *v.* Fenton, Rolls, June 23, 1807, MS. and see Lord Rosslyn's judgment in Lloyd *v.* Collet, 4 Ves. jun. 609, n.; Acland *v.* Gaisford, 2 Mad. 28; Bradshaw *v.* Midgeley, V. C. 13 Nov. 1817, MS.

(*s*) 3 Atk. 636.

(*t*) *Supra*, p. 482.

(*u*) Waldron *v.* Forester, Exch. 4th May 1804, MS.; Gaskarth *v.* Lord Lowther, 12 Ves. jun. 107; and see *ib.* 503.

when

when a specific performance was decreed, and the purchaser was decreed to pay interest. A question then arose as to the quantum, and it was decreed, that the purchaser should pay 5 *per cent.* although it was insisted that 5 *per cent.* was never given, particularly when not prayed by the bill. Lord C. B. Macdonald said, that as to the quantum, he conceived that nothing less than 5 *per cent.* would be a compensation to the vendor, and that, indeed, they had in many cases, lately given 5 *per cent.* interest, and the reason of it was too well founded to need any discussion: a person would always find it to be his interest to delay the completion of his purchase, when he knows that he is only to pay 4 *per cent.* and can make five or six of his money. Mr. Baron Thompson concurred. Mr. Baron Graham wished there had been a general rule, but the courts had been in the habit of giving 5 *per cent.* where there was delay. The reasons formerly given had now no ground. The 4 *per cent.* when established, was the current interest, but now, it was holding out an inducement to persons to delay the completion of contracts, as it was notorious that money could not be obtained for even five. Besides, here the Court had forejudged the question in making the former order, although that was without prejudice. Mr. Baron Wood concurred, and the Court carried back the interest to Lady-day 1802, when it seems they thought, upon the construction of the several agreements and letters which had passed, that the contract ought to have been completed (*v*).

In a very recent case 5 *per cent.* was decreed to be paid, although the conditions of sale were silent as to interest. The purchaser was held to have accepted the title by taking possession; and the Court said, that they

(*v*) Excheq. 30th June 1807, MS.

thought

thought where a purchaser withheld the money from the seller, he ought to pay such interest as the seller might have made of the money had it been paid to him, and that this had frequently been done by Lord Alvanley (*w*).

However, this is not the rule of the Court of Chancery. And, in a case where the conditions of sale stipulated that the purchaser should be allowed 5 *per cent.* on the deposit if a title could not be made, but did not contain any other stipulation as to interest; after a decree in a bill by the seller for a specific performance, upon a motion to vary the minutes, by making the interest payable on the purchase money 5 *per cent.* the Vice-Chancellor was of opinion that the general rule must prevail, and that the minutes of the decree were correct, confining the interest to 4 *per cent.* and gave the purchaser his costs of opposing the motion (*x*).

The same rate of interest seems payable, whether the estate be sold by private agreement, or by a master under a decree of a court of equity.

As connected with interest, we may here observe, that if the completion of a purchase has been delayed by the state of the title, the Court will compel the seller to make an allowance for any deterioration which the lands, hedges and fences have suffered by unhusbandman-like conduct and mismanagement since the date of the contract (*y*).

(*w*) Burnell *v.* Brown, Lord C. Baron sitting for the Master of the Rolls, 7 Feb. 1820, MS.; 1 Jac. and Walk. 168.

(*x*) Thorp *v.* Freer, H. T. 1820. MS.

(*y*) Foster *v.* Deacon, 3 Madd. 394, and several cases not reported.

SECTION II.

Of Costs.

AT law, the costs abide the event of the action by the vendor or purchaser. In equity, also, the person who fails in the suit must *primâ facie* be deemed liable to the costs. But still, although this is the general rule, yet costs in equity rest entirely in the breast of the Court, for the *primâ facie* claim to costs may be rebutted by the particular circumstances of the case; and it is for the Court to decide whether those circumstances are, or are not, sufficient to rebut the claim (*z*).

If a purchaser file a bill for a specific performance, which is dismissed because the defendant, the seller, cannot make a title; yet the bill may be dismissed with costs against the defendant (*a*).

If the vendor file a bill for a specific performance, which is dismissed because he cannot make a title, and the estate was misrepresented in the particulars, although without fraud, he must pay the costs (*b*). If the estate was misrepresented, and the auctioneer verbally agreed to allow a deduction if any misrepresentation should appear, the seller's bill would be dismissed, with costs, if he sought to compel the purchaser to take the estate without any allowance, because that would be a fraud. But if the purchaser do not resort to the defence set up by his answer,

(*z*) Vancouver *v.* Bliss, 11 Ves. jun. 458. See Scorbrough *v.* Burton, Barnard. Cha. Ca. 255.

(*a*) See and consider Bennet College *v.* Carey, 3 Bro. C. C. 390; Lewis *v.* Loxham, 3 Mer. 429.

(*b*) Vancouver *v.* Bliss, *ubi sup.*

until

until after the institution of the suit, that is a ground not to give costs (*c*).

Where there is no misrepresentation, and the question turn upon a point of law, upon which the opinion of the Court might fairly be taken, although the bill be dismissed against the vendor, yet it will be without costs (*d*). If a purchaser is entitled to costs, it is immaterial that the seller was only a trustee for sale (*e*).

But where the bill is dismissed against the purchaser with costs, yet he will not be allowed costs of objections argued before the Master, but abandoned at the hearing (*f*).

So a purchaser is considered as entitled to take a fair objection, and although it be overruled, yet the Court will not, on that ground, give costs (*g*), but this, of course, must always depend upon the weight which the Judge may think due to the objection (*h*). In one case, indeed, Lord Eldon thought that as the title was forced upon the purchaser, he should act hardly by him, by not giving the title the credit of making him pay the costs, for it would, he said, help the title. As, however, the vendor had contended, but unsuccessfully, that the purchaser had done acts amounting to an acceptance of the title, his Lordship refused costs (*i*).

(*c*) Winch *v.* Winchester, 1 Ves. and Beam. 375.

(*d*) White *v.* Foljambe, 11 Ves. jun. 337. See *ibid.* 463.

(*e*) Edwards *v.* Harvey, Coop. 40.

(*f*) Hayes *v.* Bailey, L. C. M. T. 1821. MS.

(*g*) Cox *v.* Chamberlain, 4 Ves. jun. 631; Stains *v.* Morris, 1 Ves. and Beam. 8; Sharpe *v.* Roahde, 2 Rose, 192.

(*h*) Burnaby *v.* Griffin, 3 Ves. jun. 266; Bishop of Winchester *v.* Paine, 11 Ves. jun. 194. See Powell *v.* Martyr, 8 Ves. jun. 146; Fludyer *v.* Cocker, 12 Ves. jun. 25; Calverley *v.* Williams, 1 Ves. jun. 210.

(*i*) M'Queen *v.* Farquhar, 11 Ves. jun. 467.

Where

Where the objection to the title has already been decided in a former cause, of which the purchaser had notice, the purchaser will be decreed to pay the costs of the suit (*j*).

And although a purchaser may fairly object to a title on the ground of a doubtful fact; yet if the fact is found against him, he cannot claim costs, although he will not be compelled to pay them. This was decided in Thorpe v. Freer (*k*), where the bankrupt was made a party to the suit, to establish the fact that he had not executed the power before his bankruptcy. He demurred to the bill, as he might be examined in the bankruptcy, and the late Vice-Chancellor allowed the demurrer. He was then examined before the commissioners, and upon the examination it was held that the power remained unexecuted. Upon these grounds it was contended on behalf of the purchaser, that he was entitled to his costs, as it was necessary to establish the fact, but they were refused to him on the ground above stated.

In a case where the Master reported that the abstract delivered by the vendor before the filing of the bill was sufficient, but he found that the purchaser required certain evidence in support of the abstract, some of which was necessary, but not furnished, and some not necessary; the Lord Chancellor held that both of the parties were in the wrong; and, upon the vendor's bill, his Lordship held that no costs ought to be given on either side (*l*).

Where a seller does not make out his title until after the bill is filed, he is liable to pay the costs of the suit up to the time that he showed a good title (*m*). But the Court

(*j*) Biscoe v. Wilks, 3 Mer. 456.

(*k*) MS. see 4 Madd. 466.

(*l*) Newall v. Smith, 1 Jac. and Walk. 263.

(*m*) Wilson v. Allen, 1 Jac. and Walk. 623, and many MS. cases. See Wynn v. Morgan, 7 Ves. jun. 202; Collinge's case, 3 Ves. and Bea. 143, n. (*a*).

will

will not let this rule operate as a trap for the purchaser; and if further abstracts are furnished after the bill is filed, will inquire whether they are material. So, as to evidence. But, as to evidence, much depends upon the fact whether further evidence was required by the purchaser. In one case an act of parliament, for releasing the estate from certain portions, was obtained after the filing of the bill. The Master found that a good title was shown when the act was delivered to the purchaser. The purchaser claimed the costs to a later day, on the ground that the act recited a release by deed of other portions, an abstract of which had not been furnished. The Vice-Chancellor held that the act was tantamount to an abstract, and that the purchaser should have called for an abstract of the deed, if he had intended to insist upon the want of it as an objection (*n*).

In the case of Smith *v.* Leigh (*o*), the Master found that the seller could make a title in February 1820, which was subsequently to filing the bill. To the Master's report the purchaser took an exception, and elected to have a case sent to law, which the Vice-Chancellor granted as a matter of course. The point was decided against him; and, upon the cause coming on for further directions, the exception was overruled, and a specific performance decreed, and the purchaser was to be paid the costs up to February 1820, other than the costs of his insisting, by his answer, on the illegality or abandonment of the agreement, and the purchaser was to pay the costs of the subsequent proceedings before the Master, and the costs of the case to the Common Pleas, and the plaintiff was to pay the costs of the hearing.

In the case of Bruce *v.* Bainbridge (*p*), where the bill

(*n*) Emery *v.* Growcock, 1821. MS.

(*o*) V. C. 10 Aug. 1821. MS.

(*p*) Same day, MS.

was

was filed by the seller, the Master's report was in favour of the title, a case was sent to the C. P. and the certificate was against the title. The bill was dismissed, with costs, from the date of the Master's report.

If a seller, upon a reference to the Master, establish his title upon a different ground from what appeared in the abstract, the purchaser will be allowed the costs of the reference and the applications to the Court (*q*). So where a purchaser might in the first instance have rescinded the contract, but binds himself by long acquiescence, the vendor will not be entitled to costs (*r*).

Lord Thurlow has said, that if a purchaser will not wait until the title is cleared, but will take possession, and put the vendor to all the inconvenience of the discussion, when he is out of possession, and the other has got it, that weighs much as to costs (*s*). But the circumstance of taking possession is not important, where, by the terms of the contract, the title is to be made good at a subsequent period; much less is it material where the purchaser is induced to take possession at the instance of the vendor himself (*t*).

It is, however, to be repeated, that every case must stand on its own grounds, although, from these few instances, some notion may perhaps be formed of what the Court is likely to do in other cases. To multiply the instances in which costs in equity have been given or refused, would be as useless as it would be tedious.

(*q*) Fielder *v.* Higginson, 3 Ves. and Bea. 142.

(*r*) Dickenson *v.* Heron, *sup.* p. 482.

(*s*) 11 Ves. jun. 464. See Calcraft *v.* Roebuck, 1 Ves. jun. 222.

(*t*) 11 Ves. jun. 464. *Vide sup.* p. 10.

CHAPTER XI.

OF THE OBLIGATION OF A PURCHASER TO SEE TO THE APPLICATION OF THE PURCHASE MONEY.

WHERE a trust is raised by deed or will for sale of an estate, a clause, that the receipts of the trustees shall be sufficient discharges for the purchase money, is mostly inserted, and rarely ought to be omitted; because, notwithstanding that a purchaser would, at law, be safe in paying the money to the vendors, although they were trustees, yet equity will, in some cases, bind purchasers to see the money applied according to the trust, if they be not expressly relieved from that obligation by the author of the trust; and where the purchaser is bound to see to the application of the money, great inconvenience frequently ensues, and, in some instances, it would be difficult to compel the purchaser to complete the contract.

The rules on this subject may be considered under two heads: First, with respect to real estate. Secondly, with respect to leaseholds, or chattels real. For the rules applicable to the different species of estates are dissimilar; owing to the much greater power which a testator has over his real, than over his personal estate.

Previously to the statute of fraudulent devises (*a*), freehold lands were not bound by even specialty debts in the hands of an *hæres factus*; although an *hæres natus* was

(*a*) 3 W. and M. c. 14.

liable

to specialty debts in respect of lands descended (I); rsonal property, which was formerly of very trifling was always holden to be subject to the *payment of generally*, however the same might be bequeathed. y the statute of Westminster 2 (*b*), it was enacted, ren the ordinary should be bound to pay the debts intestate, so far as his goods would extend, in the nanner as executors were bound in case the deceased ft a will. In fact no man can exempt his personalty he payment of his debts; but it must go to his ors as assets for his creditors, and be applied in a urse of administration; that is, *however it may be thed*, it must go to the executors, upon trust, in the ace, for payment of debts generally. Now, although thor of the trust may have neglected to free the sers of his property from the obligation of seeing e money is duly applied, yet equity hath thought it able that a purchaser should see to the application purchase money where the trust is of a defined and l nature only; and not where the trust is general limited, as a trust for payment of debts generally.

(*b*) 13 Ed. I. c. 19.

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lthough an heir at law is bound by specialty debts in respect of scended, yet a purchaser of those lands, without notice of any ns never holden to be subject to them. The statute of fraudu- vises was always considered as placing a devisee on exactly the ooting as an heir at law; but it was lately contended (see rs *v.* Jones, 2 Anstr. 506,) that the debts of the testator would purchaser from the devisee, although he bought *bonâ fide* and notice. But this was overruled. Equity will, however, in of creditors, grant an injunction against a purchaser to restrain it to the heir. Green *v.* Lowes, 3 Bro. C. C. 217. In Woodgate dgate, MS. the Lord Chancellor was of opinion, that simple con- reditors, under 47 Geo. III. stand in the above respect in the situation as specialty creditors under the statute of fraudulent

From these rules it necessarily follows, that a *bonâ fide* purchaser of a leasehold estate from an executor ought not to be bound to see to the application of the purchase money, although defined and limited trusts be declared of the purchase money. But, as a testator can declare an *original* limited trust of his real estate, wherever such a trust is created, the purchaser is bound to see the money duly applied.

SECTION I.

Of this Liability, with reference to real Estate.

THESE appear to be the principles upon which the distinctions on this subject are grounded, and we may now enter upon an examination of the rules themselves. And, first, with respect to real estate.

1. If the trust be of such a nature, that the purchaser may reasonably be expected to see to the application of the purchase money, as if it be for the payment of legacies, or of debts which are scheduled or specified, he is bound to see that the money is applied accordingly (c);

(c) Culpepper v. Aston, 2 Cha. Ca. 221. See. Show. 313; Spalding v. Shalmer, 1 Vern. 301; Dunch v. Kent, 1 Vern. 260; Anon. Mose. 96; Abbot v. Gibbs, 1 Eq. Ca. Abr. 358, pl. 2; Elliot v. Merryman, Barnard. Rep. Cha. 81; Smith v. Guyon, 1 Bro. C. C. 186, and the cases cited in the note (I); and see 1 Ves. 215.

(I) One of these cases, Langley v. Lord Oxford, is in Reg. Lib. B. 1747, fol. 300; see *post*, S. C. Ambl. 17. The other case, Tenant v. Jackson, and Cotton v. Everall, are in Reg. Lib. 1773, B. fol. 120. 481.

and

l that although the estate be sold under a decree of a
irt of equity (*d*), or by virtue of an act of parliament (*e*).
2. If more of an estate be sold than is sufficient for the
poses of the trust, that will not turn to the prejudice of
purchaser; for the trustees cannot sell just sufficient
pay the debts, &c. Besides, in most cases, money is
be raised to pay the trustees expenses (*f*).
3. Where the trust is for payment of debts generally,
urchaser is not bound to see to the application of the
chase money, although he has notice of the debts;
a purchaser cannot be expected to see to the due ob-
vance of a trust so unlimited and undefined (*g*).
4. Nor is a purchaser bound to see the money applied,
ere the trust is for payment of debts generally, and also
payment of legacies (I); because, to hold that he
liable to see the legacies paid, would in fact involve
n in the account of the debts, which must be first
d (*h*) (II).

5. And

d) Lloyd v. Baldwin, 1 Ves. jun. 173. See Binks v. Lord Rokeby, 2 Madd. 227.

e) Cotterell v. Hampson, 2 Vern. 5.

f) Spalding v. Shalmer, 1 Vern. 301.

g) See the cases cited above, Humble v. Bill, 1 Eq. Ca. Abr. 358, pl. 4; *Ex parte* Turner, 9 Mod. 418; Hardwicke v. Mynd, 1 Anstr. 109; and Williamson v. Curtis, 3 Bro. C. C. 96; Barker v. Duke of Devon, 3 Mer. 310.

(*h*) Jebb v. Abbot, and Benyon v. Collins, Butler's n. (1) to Co. Litt. 290, b. s. 12; and Rogers v. Skillicorne, Ambl. 188.

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i) The above rule, although so long and clearly settled, appears to e been entirely overlooked in the case of Omerod v. Hardman, before Duchy Court, reported in 5 Ves. jun. 722; but this case can by no ns be considered as an authority, and has been expressly denied by d Eldon. See 6 Ves. jun. 654, n. *Qu.* however, whether the case merod v. Hardman was not thought to be within the principle stated l. 13, *post*.

II) And where the whole money has been raised, the heir or devisee will

5. And for the same reason the purchaser is, of course, not bound to see that only so much of the estate is sold as is necessary for the purposes of the trust.

6. But although there be no specification of the debts, yet a purchaser, it is said, must see to the application of the money where there has been a decree; as that reduces it to as much certainty as a schedule of the debts. In such cases, therefore, the purchaser should not pay to the trustees, but must see to the application, and take assignments from the creditors: otherwise he should apply to the Court, that the money may be placed in the Bank, and not taken out without notice to him; the reason of which is, that it is at his peril (*i*), It is now, however, the prevailing opinion, that the purchaser is not, in such a case, bound to see to the application of the money. The Court takes upon itself the application of the money.

7. It is the general opinion of the profession, that where *the time of sale is arrived*, and the persons entitled to the money are infants or unborn, the purchaser is not bound to see to the application of the money; because he would otherwise be implicated in a trust, which in some cases might be of long duration. This point has lately been so decided (*j*).

8. But if an estate is charged with a sum of money for an infant, payable at his majority, and there is no direction to appropriate the money, a purchaser cannot safely complete his purchase, although the money be invested in the funds as a security for the payment of the legacy to the

(*i*) Lloyd *v.* Baldwin, 1 Ves. 173. (*j*) Sowarsby *v.* Lacy, 4 Madd. 142.

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will be entitled to the estates unsold, and the creditors or legatees will have no remedy against the same; because the estate is debtor for the debts and legacies, but not for the faults of the trustees. Anon. in Dom. Proc. 1 Salk. 153.

infant,

infant, when he shall become entitled; for if, in the event, the fund should turn out deficient for payment of the infant's legacy, he must still have recourse to the estate for the deficiency. And it should seem, that even a court of equity cannot, in a case of this nature, bind the right of an infant (*k*).

9. It appears to be thought by the profession, that although the trusts are defined, yet that payment to the trustees is sufficient, wherever the money is not merely to be paid over to third persons, but is to be applied upon trusts which require time and discretion, as where the trust is to lay out the money in the purchase of estates.

In a recent case, where the trust was to pay the money amongst creditors, who should come in within eighteen months, the estate was sold after that time had elapsed, and the late Master of the Rolls held, that the receipt of the trustees was a good discharge (*l*). The deed, he observed, very clearly conferred an immediate power of sale, for a purpose that could not be immediately defined, viz. to pay debts which could not be ascertained until a future and distant period. It was impossible to contend, that the trustees might not have sold the whole property at any time they thought fit, after the execution of the deed; and yet it could not be ascertained, until the end of eighteen months, who were the persons among whom the produce of the sale was to be distributed. If the sale might take place at a time when the distribution could not possibly be made, it must have been intended, that the trustees should, of themselves, be able to give a discharge for the produce; for the money could not be paid to any other person than the trustees. It is not material, that the objects of the trust might have been actually

(*k*) Dickenson *v.* Dickenson, 3 Bro. C. C. 19.

(*l*) Balfour *v.* Welland, 16 Ves. jun. 151.

ascertained before the sale. The deed must receive its construction as from the moment of its execution. According to the frame of the deed, the purchasers were or were not liable to see to the application of the money; and their liability could not depend upon any subsequent event. Another ground relied upon in this case, was, that the creditors were parties to the deed, which clearly intended that the trustees should receive and apply the money.

10. So where the trust is to lay out the money in the funds, &c. upon trusts, if the purchaser see it invested according to the trust, and procure the trustees to execute a declaration of trust, he is in practice considered as discharged from the obligation of seeing to the further application of the money.

This appears to have been the settled practice in Mr. Booth's time; for in answer to a question how far a purchaser was, in a case of this nature, bound to see to the application of the purchase money, he said, he was of opinion, that all that would be incumbent on the purchaser to see done in the case, would be to see that the trustees did invest the purchase money in their own names, in some of the public stocks or funds, or on government securities; and in such case the purchaser would not be answerable for any non-application (after such investment of the money) of any monies which might arise by the dividends or interest, or by any disposition of such funds, stocks or securities, it not being possible that the testator should expect from any purchaser any further degree of care or circumspection than during the time that the transaction for the purchase money was carrying on; and therefore the testator must be supposed to place his sole confidence in the trustees; and this, he added, was the settled practice in such cases, and he had often advised

so much and no more to be done; and particularly in the case of the trustees under the Duchess of Marlborough's will. And in this opinion Mr. Wilbraham concurred *(m)*.

11. The same rules respecting the liability of a purchaser to see to the application of the purchase money appear to apply, whether the estate be devised or conveyed to trustees to sell for payment of debts, &c. or whether it be only *charged* with the debts; although a difference of opinion has prevailed in the profession on this point.

In a case in Mosely (*n*) it was laid down, that a purchaser should be bound to see to the application of the purchase money where the debts were only charged on the estate.

But in Elliot *v.* Merryman (*o*), the Master of the Rolls decreed otherwise; because, if the contrary rule were holden, no estate could in such cases be sold, except through the medium of the Court of Chancery, which would be productive of the greatest inconvenience.

Lord Chancellor Camden *(p)* appears to have been of the same opinion; and in a late case (*q*) Lord Chancellor Eldon said, that where a man, by a deed or will, *charges* or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application of the purchase money.

This point may be considered as settled upon principle, as well as authority. For although a mere charge is no legal estate, but only that declaration of intention upon

(*m*) See 2 vol. Cas. and Opin. 114.

(*n*) Anon. Mose. 96; and see Newell *v.* Ward, Nels. Cha. Rep. 38.

(*o*) Barnard. Rep. Cha. 78; 2 Atk. 41; Ambl. 189, marg.

(*p*) See Walker *v.* Smalwood, Ambl. 676.

(*q*) See 6 Ves. jun. 654. n.

which

which a court of equity will fasten, and by virtue of which they will draw out of the mass going to the heir, or to others, that quantum of interest that will be sufficient for the debts *(r)*; yet it is as much a trust, as a direct conveyance or devise to trustees for the same purpose: the only difference is, that in the case of a charge, the trust arises by the construction of equity; whereas in the case of a conveyance or devise, it is produced by the express declaration of the party; and when the trust is *in esse*, it seems wholly immaterial by what means it has arisen.

It seems hardly necessary to remark, that where lands are charged with the payment of annuities, those lands will be liable in the hands of a purchaser, because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund *(s)*.

So where an estate is devised, subject to existing charges, the purchaser must of course see the charges duly paid.

12. These are the distinctions which, according to the books, appear to exist in regard to the liability of a purchaser to see to the application of money arising by sale of estates conveyed or devised to trustees upon trust to sell; but the reader must be apprised, that some gentlemen are of opinion, that a purchaser is *in no case* bound to see to the application of purchase money, *where there is a hand appointed to receive the money.* And it appears that Lord Kenyon, when Master of the Rolls, inclined strongly to the opinion, although he made no decision, that trustees having the power to sell, they must have the power incident to the character, viz. the power to give a discharge *(t)*.

(*r*) See Bailey v. Ekins, 7 Ves. jun. 323.

(*s*) Elliot v. Merryman, Barnard. Rep. Cha. 82. See Wynn v. Williams, 5 Ves. jun. 130.

(*t*) See 4 Ves. jun. 99,

So

So the late Master of the Rolls observed, that he thought the doctrine upon this point had been carried further than any sound equitable principle would warrant. Where, he added, the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the trust of which they have notice; but where the sale is made by the trustee in performance of his duty, it seems extraordinary that he should not be able to do what one should think incidental to the right exercise of his power, that is, to give a valid discharge for the purchase money. But it was not necessary to determine that in the case before his honour (*u*).

Of those who hold that a purchaser is only liable to see to the application of the money where there is *not* a hand appointed to receive the money, and the trusts of the money are defined, Mr. Powell is the only one whose reasons are before the profession (*x*). The whole of Mr. Powell's argument (I) appears to have been suggested to him, and indeed depends on the case of Cuthbert *v.* Baker. For throughout the many cases which have been referred to in this chapter, the decisions have invariably been pronounced on the distinction between a limited and a general trust; and in no case has the appointment of a hand to receive the money been considered as affecting the question, any further than that it at one time seems to have been thought, that in every case of a mere charge, the purchaser was bound to see to the application of the money. That this was always deemed the true distinction, is evinced by manuscript and printed opinions to that effect, of all the most leading characters in the pro-

(*u*) See 16 Ves. jun. 156. (*x*) See 1 Mortg. 312—330, 4th edit.

(I) See the 3d edition of Powell on Mortgages, where the point is not noticed.

fession of the last and present century. So Lord Eldon, in condemning the doctrine advanced in Omerod *v.* Hardman *(y)*, did not say it was wrong because there was a hand appointed to receive the money (which was the fact), but because the first trust was for payment of debts generally.

Mr. Powell, however, was not singular in his construction of the decree in the case of Cuthbert *v.* Baker. It is well known by the profession, that Lord Redesdale, who was counsel for Baker, the purchaser, considered the decision in the same light.

The case is thus stated by Mr. Powell:—*A* made his will *(z)*, and thereby directed that all his personal estate (except as therein excepted) should be applied, as far as the same would extend, in payment of debts, legacies, and funeral expenses, and of all annuities by him granted; and if such personal estate should not be sufficient for those purposes, then it was his further will and desire, and he did direct, that the deficiency, whatever it might be, should be paid and made good out of his real estate (except a part therein mentioned, which he did not intend to make subject thereto), and which real estates he charged with the payment of such deficiency, to whose hands soever the same came. And so subject and exempt, he gave, devised, &c. all his real and personal estate in the following manner: certain parts of his estate to his wife in fee; and as to the manors, messuages, &c. not given to his wife in fee, he devised them to his wife for life; and, after her decease, he gave the same to trustees, in trust to sell and to divide and to distribute the money which should arise by such sale between and amongst

(*y*) See 6 Ves. jun. 654, n. *et supra*, n. (l) to s. 4.

(*z*) Mr. P. refers to 4th July 1790, Reg. Lib. 4, 441; the correct reference is Lib. Reg. A. 1790, fo. 442.

such

such child or children of *A B* on the body of his then wife begotten; and such children of *C D* (I) as should be living when the devise to the trustees should take effect, equally share and share alike, to take *per capita*, and not *per stirpes:* if but one such child, the estate to be transferred to him, and not to be sold. The wife died. One trustee died in her life-time. The surviving trustee sold the estate by auction. The personal estate was sufficient to discharge the debts: the claimants under the devise to children were seven children of *A B*, and six children of *C D* (II), who were entitled to the purchase money in equal shares. One of the children of *C D* was in the East Indies, and two were infants. The purchaser refused to complete his purchase, objecting thereto on the ground, that there being no proviso in the will to exonerate the purchaser from seeing to the application of the money, the purchaser was bound to know or find out what children of the persons in that behalf named were living at the testator's wife's death; for that such children ought individually to execute the conveyance, and give releases for their respective claims; and that one being in the East Indies, and two being infants, could not join in such conveyance. But the decree was, that the contract should be carried into execution, that the infants shares of the purchase money should be paid to the Accountant-general, and that the remainder of the purchase money should be paid to the trustee. The decree proceeded to direct that all proper parties should join in the proper conveyances.

Mr. Powell observes, that this decision, though not final, as it still left room for an application to the Court to

(I) This is mistated, for the money was given to such of the children of *three* persons as should be living at the time when the devise to the trustees should take effect.

(II) This is inaccurate. There were seventeen children in all.

determine

determine who might be proper parties to the conveyance, appeared to him to be conclusive on the question, whether the persons beneficially entitled are necessary parties; because there could be no ground to consider those persons as necessary parties, unless it were to discharge the purchaser: but there seemed to him to be no power in the Court to compel a person beneficially interested in money to arise by sale of land, to discharge that land, unless it were upon paying or securing the money to him. But the Court, by directing the payment to the trustee, had done that which rendered a direction to pay to the *cestui que trust* impossible.

It will be seen that Mr. Powell's argument is entirely founded on the order to pay the remainder of the purchase money to the trustee, and this ground wholly fails him; *for all the* cestuis que trust *were plaintiffs, and the prayer of the bill was, that the infants shares might be invested, and that the remainder of the purchase money might be paid to the trustee.*

It is not noticed in the foregoing statement of the case, that no costs were given; but the fact is, that the purchaser was refused his costs, and that circumstance may perhaps induce a conclusion, that the construction put upon the case by Mr. Powell is correct.

But it is conceived, that there is a ground upon which the decision may be supported without impeaching the settled doctrine on this subject. The trust was for such of the children of three persons as should be living when the estate should fall into possession, and it was strongly insisted by the bill, and, it is apprehended, with great reason, that the *cestuis que trust* were in regard to the purchaser undefined; and he was not bound to ascertain or inquire how many there were, and who they were. The facts of the case were such as to tempt a judge to put

that

that construction on the trust; there were seventeen children, two of whom were infants, and another was in the East Indies. It should seem, therefore, that there is a solid principle to which Lord Thurlow's decision can be referred, and, consequently, a purchaser can scarcely be advised to incur the risk of paying money to a trustee, on the authority of this case, in opposition to the former decisions. Perhaps another ground remains upon which the decision might have been made. All the *cestuis que trust* of age, and in the kingdom, offered, previously to the commencement of the suit, to give receipts for their shares: the receipt of the trustee would certainly have been a sufficient discharge for the shares of the infants, and also, as it is conceived, for the share of the *cestui que trust*, who was abroad. And in this view of the case the purchaser was clearly liable to the costs. It were difficult to maintain, that the absence of a *cestui que trust* in a foreign country shall, in a case of this nature, impede the sale of the estate. Lord Thurlow's judgment in this case would be a very desirable present to the profession. In a case which came before the same judge a few years before that of Cuthbert *v.* Baker, and which I learn from a gentleman who has seen the papers relating to the estate, if correctly reported, the estate was subjected to the payment of debts generally; and his Lordship said, that the purchaser was a mere stranger, and was not bound to look to the application: *where the estate is to be sold, and a specific sum, as 5l. to be paid to* A, *the purchaser must see to the application*; but where it is to be sold generally, he is not *(a)*.

In the case of Currer *v.* Walkley, reported in Mr. Dickens's second volume *(b)*, which was also before Lord Thurlow, it is stated, that the testator had devised estates,

(a) Smith v. Guyon, 1783, 1 Bro. C. C. 116. (b) 2 Dick. 649.

subject to particular charges: he afterwards entered into a contract for a part of the estate, and the purchaser paid the sum of 600*l.* as a deposit. The bill was for an account of what was due to the plaintiff in respect to his charge, and that the purchaser might pay out of the remainder of his purchase money what remained due to the plaintiff. Lord Chancellor Thurlow is reported to have said, that if an estate is devised to trustees to sell, and the testator afterwards contracts for the sale of the estate, it is enough for the purchaser to pay the purchase money into the hands of the trustees, to apply it, as it doth not lie with him to see it applied; but if the estate be devised, subject to particular charges, it is incumbent on him to see it applied in payment of those particular charges.

This case seemed to apply to the point under discussion; but no reliance could be placed upon it, as it was to be inferred from the report, that Lord Thurlow held that a devise of an estate was not revoked in equity by a subsequent contract for sale of it--a doctrine which it was difficult to suppose could have fallen from so great a judge.

The case is stated in the Register's book (*c*), by the name of Comer *v.* Walkley, and Mr. Dickens's report of it is a complete mistatement. The estate was originally devised to trustees upon trust to sell and pay debts generally. The estate was subject to an annuity at the death of the testator. The trustee sold a part of the estate for 720*l.*, 600*l.* was left in the purchaser's hand as an indemnity against the annuity. The purchaser afterwards paid 250*l.* part of the 600*l.* to the trustee. By several conveyances, &c. the estate purchased became again vested in trustees upon trust, to sell for payment of debts generally.

(c) Reg. Lib. A. 1784, fol. 625.

These

These trustees sold the estate to Charles Whittard, who objected to complete the contract without the concurrence of the person entitled to the residue, then unpaid, of the 500*l.* After a great lapse of time the person entitled to the residue of the 600*l.* filed a bill against Whittard and others for payment of it; and Whittard filed another bill for a specific performance, which was accordingly decreed; and the proper accounts were directed to be taken in the first cause. Whittard's costs in both causes were allowed to him. The decision, therefore, appears to have been, that the 600*l.* was a lien on the land. The latter part of Lord Thurlow's judgment, reported by Dickens, clearly referred to the annuity, which was a subsisting charge on the estate at the testator's death. And adverting to the circumstances of the case, the first part of the judgment may, perhaps, be read thus: If an estate is devised to trustees to sell, and the *trustees* afterwards contract for the sale of the estate, it is enough for the purchaser to pay the purchase money into the hands of the trustees to apply it, as it doth not lie with him to see it applied. Now this, as corrected, seems in favour of the opinion, that where a hand is appointed to receive the money, a purchaser is not bound to see to the application of the purchase money; but it should not be forgotten, that this observation was made in a case where the trust was for payment of debts generally.

[*]13. Where the trust is to raise so much money as the personal estate shall prove deficient in paying the debts, or debts and legacies, it seems formerly to have been doubted whether the purchaser was not bound to ascertain the deficiency. Mr. Fearne thought a purchaser was bound to do so *(d)*. But the opinion of the profession is

(*d*) Fearne's Posthuma, p. 121.

 certainly

certainly otherwise *(e)*. Indeed, a direction that the personal estate shall be first applied, only expresses the rule of equity, where, as in a case of this nature, no intention appears to exonerate the personalty from the payment of the debts; and, therefore, such a direction cannot be deemed material.

14. Where a *mere power* is given to trustees to sell, for the purpose of raising as much money as the personal estate shall prove deficient in paying the debts, or debts and legacies, it seems, that unless the personal estate be actually deficient, the power does not arise, and consequently cannot be duly executed. This was expressly decided in the case of Dike *v.* Ricks *(f)*, where, in a case of this nature, it was determined by Jones, Croke and Barkeley, Justices, unanimously, that the condition was a precedent condition, and that the performance of it ought to be sufficiently averred, otherwise the power would not authorize a sale; and that the amount of the debts, and the value of the personal estate, ought to be shown, so that the Court might judge whether the condition was performed or not; and also that so much only of the estate could be sold as was sufficient for payment of the debts. And the case of Culpepper *v.* Aston *(g)*, also appears to be an authority, that in a case of this nature a purchaser is bound to ascertain the deficiency; for in that case the will seems to have given a *mere power* (*h*) to the executors to raise as much money as the personal estate should fall short in paying the debts. The will was revoked *pro tanto* by a subsequent conveyance creating a direct trust to sell and pay debts, under which it seems the purchaser

(*e*) See the 12th section of Mr. Butler's n. (1) to Co. Litt. 209, b.

(*f*) Cro. Car. 335; Wm. Jones, 327; 1 Ro. Abr. 329, pl. 9; 3 Vin. Abr. 419, pl. 9.

(*g*) See 2 Cha. Ca. 221.

(*h*) 2 Cha. Ca. 115.

bought;

ıght; and therefore the point did not call for a deci-
n. But it was resolved, that by the trust (that is, power)
the will to sell, the purchaser did purchase at his own
il, if the personal estate received were sufficient; but
t if the trust were as in the deed, the purchaser was
e.

The reader must be aware, that as the power is not well
cuted, unless there be a deficiency, a purchaser must,
his peril, ascertain the fact, notwithstanding that the
t be for payment of debts generally; or being for pay-
nt of particular debts or legacies, the *common clause*,
t the trustees receipts shall be sufficient discharges, be
rted in the instrument creating the trust.

Wherever, therefore, a power of this nature is given,
l even where a trust for such purposes is raised, it
ms advisable, as Mr. Butler remarks, to extend this
se a degree further, by expressly discharging the pur-
ser or mortgagee from the obligation of enquiring,
ether the personal estate has been got in and applied;
l by expressly authorizing the trustees to raise any
ney they may think proper by sale or mortgage,
ugh the personal estate be not actually got in or ap-
d. For it frequently happens, that the getting in of
personal estate is attended with great delay and diffi-
y; during which the real estate cannot perhaps be
rted to. This will be obviated effectually by inserting
ause to the above effect. It should, however, be ac-
panied with a further direction, that so much of the
sonal estate, and the money raised under the trust, as
ll remain after answering the purposes of the trust,
ll be laid out in land, to be settled on the devisees of
real estates (*i*).

5. Where a purchaser is bound to see the money
plied according to the trust, and the trust is for pay-

(*i*) Butler's n. (1) to Co. Litt. 290, b.

ment of debts, or legacies, he must see the money actually paid to the creditors or legatees.

In cases of this nature, therefore, each creditor or legatee, upon receiving his money, should give as many receipts as there are purchasers, so that each purchaser may have one. Or, if the creditors or legatees are but few, they may be made parties to the conveyances.

Another mode by which the purchasers may be secured is, an assignment by all the creditors and legatees of their debts and legacies to a trustee, with a declaration that his receipts shall be sufficient discharges; and then the trustee can be made a party to the several conveyances.

Sometimes a bill is filed for carrying the agreement into execution, when the purchase money is of course directed to be paid into court; and this is the surest mode, because the money will not be paid out of court without the knowledge of the purchaser.

16. If the names of the trustees be inserted in the usual clause, that the receipts of the trustees shall be discharges, every trustee who has accepted the trust must join in the receipt for the purchase money, although he may have released the estate to the other trustees (*k*); because, notwithstanding that he release the legal estate to his co-trustees, he cannot delegate the personal trust and confidence reposed in him; for the rule is, *delegatus non potest delegare.*

To obviate this difficulty, which frequently occurs, it might, perhaps, be advisable (instead of naming the trustees in the clause) to say, that the receipts "of the trustees or trustee, for the time being, acting in the execution of the trusts hereby created," shall be sufficient discharges. This would probably render it unnecessary for a trustee who had released the estate to join in any receipt:—there could not be the slightest ground to

(*k*) Crewe *v.* Dicken, 4 Ves. jun. 97.

contend,

contend, that any personal trust or confidence was given to the trustees named in the instrument creating the trust; and therefore the receipt of the trustees acting in the trusts, for the time being, would satisfy as well the words as the spirit of the clause (*l*).

17. But as one man cannot impose a trust on another against his consent, a trustee who has refused to accept the trust, and actually renounced, need not join in any receipts; in such cases the receipts of the other trustees will be sufficient discharges (*m*). Upon this point, however, a difference of opinion appears to prevail in the profession.

18. Where an estate is devised or conveyed to trustees to sell for payment of debts generally, without a clause that their receipts shall be discharges, and they convey to a third person, *for the purposes of the trust*, sales made by him are as effectual as sales made by the trustees themselves, and his receipt is equally a discharge to a purchaser (*n*); because, in such cases, the receipt is effectual by reason of the trust itself, and not owing to any personal confidence given by the author of the trust, or to any express declaration by him for that purpose.

SECTION II.

Of this Liability, with reference to Leasehold Estates.

1. We have already seen, that however leasehold estates may be bequeathed, they must go to the executors, to be applied, in the first place, in a due course of administra-

(*l*) See Co. Litt. 113, a.

(*m*) See Sir William Smith v. Wheeler, 1 Ventr. 128; Hawkins

(*n*) Hardwicke v. Mynd, 1 Anstr. 109. See Lord Braybroke v. Inskip, 8 Ves. jun. 417; *sed qu.*

tion, which is tantamount to a bequest for payment of debts generally. And, therefore, in analogy to the decisions upon devises of real estates for a similar purpose, it is incontrovertibly settled, that a purchaser of personalty shall in no case be bound to see to the application of the purchase money, where he purchases *bonâ fide*, and without notice that there are no debts (*o*).

This principle was adhered to in the case of Humble *v.* Bill (*p*), before Sir Nathan Wright, where a man bequeathed a specific part of his personalty upon trust to raise a sum of money for his daughter, and the executors mortgaged it, pretending want of assets. The decision was, however, reversed in the House of Lords (*q*); but the reversal is generally supposed to have proceeded from proof of fraud, and has not been attended to in subsequent cases.

Thus, in Ewer *v.* Corbet (*r*), it was expressly holden, that a term being bequeathed to *A* did not prevent the executors from selling it; and that notice of the devise was nothing, as every person buying of an executor necessarily must have such notice. And the Master of the Rolls said, he remembered it to have been once ruled, that an executor could not make a good title to a term to a purchaser, and that was in the case of Bill *v.* Humble; but since that he took it to have been resolved, and with great reason, that an executor, where there were debts, might sell a term; and the devisee of the term had no

(*o*) Elliot *v.* Merryman, Barnard. Rep. Cha. 78; 2 Atk. 41. See Watts *v.* Kancy, Toth. 141; S. C. *ibid.* 227, by the name of Mutts *v.* Kancie; and Nurton *v.* Nurton, *ibid.*

(*p*) 2 Vern. 444; 1 Eq. Ca. Abr. 358, pl. 4.

(*q*) See Savage *v.* Humble, 1 Bro. P. C. 71; and see 17 Ves. jun. 160, 161.

(*r*) 2 P. Wms. 148; and see Burting *v.* Stonnard, 2 P. Wms. 150; and Andrew *v.* Wrigley, 4 Bro. C. C. 137; and Dickenson *v.* Lockyer, 4 Ves. jun. 36.

other

other remedy but against the executor to recover the value thereof, if there were sufficient assets for the payment of debts.

2. This doctrine has been carried so far, that a sale in satisfaction of a private debt of the executor has been holden good (*s*).

But in the first authority on this head (*t*), it appears that the testator had been dead two years before the assignment, although that circumstance is not mentioned in the report (*u*); and it might, therefore, be supposed, that the executor might in that case have entitled himself to the term, on account of advances made by him in his trust (*x*); and it also appears that he was sole residuary legatee (*y*). On the former ground alone, the decision perhaps cannot be supported; for Lord Thurlow decided differently in a case nearly similar, although between three and four years had elapsed from the death of the testator to the transaction (*z*).

With respect to the second authority on this head (*a*), Lord Kenyon expressly dissented from it in the case of Bonney *v.* Ridgard (*b*); and in a late case (*c*), where an executor, shortly after the decease of his testatrix, transferred stock, part of her estate, to his bankers, to secure a debt due from him, and future advances; the bankers swore that they did not know or suspect, that the funds

(*s*) Nugent *v.* Gifford, 1 Atk. 463; and Mead *v.* Lord Orrery, 3 Atk. 235; and see Ithell *v.* Beane, 1 Ves. 215.

(*t*) Nugent *v.* Gifford.

(*u*) See 4 Bro. C. C. 136.

(*x*) See 7 Ves. jun. 107.

(*y*) See 17 Ves. jun. 163.

(*z*) Scott *v.* Tyler, 2 Dick. 724; 2 Bro. C. C. 431; and see 17 Ves. jun. 164.

(*a*) Meade *v.* Lord Orrery.

(*b*) 2 Bro. C. C. 433; 4 Bro. C. C. 130; 7 Ves. jun. 167, cited; and see Andrew *v.* Wrigley, 4 Bro. C. C. 125.

(*c*) Hill *v.* Simpson, 7 Ves. jun. 152; and see Lowther *v.* Lowther, 13 Ves. jun. 95; and 17 Ves. jun. 169.

were not the property of the executor, either as executor or devisee: and it appeared in evidence, that he represented himself as absolutely entitled to them, under the will, subject to a trifling annuity, and a few small legacies; although no fraud was proved, yet as gross negligence appeared in the bankers not inspecting the will, the funds were holden to be liable to the legacies given by the will.

It seems clear, therefore, that an executor cannot now dispose of his testator's property, as a security for, or in payment or satisfaction of his own debts.

In a late case, however, where, a considerable time after the death of the testator, part of the assets were pledged with bankers as a security for monies advanced at the time, and future advances to the two acting executors; a bill filed by co-executors, who had not acted in the affairs of the testator, for delivery up of the assets, was dismissed, but without deciding what the equity would be if the title was nothing more than deposit, and the bill had been filed by a legatee (*d*).

3. If the executor sell at an undervalue, or to one who has notice that there are no debts, or that all the debts are paid (*e*), or if there be any express or implied fraud or collusion between the executor and purchaser, the sale cannot be supported (*f*).

Fraud and covin will vitiate any transaction, and turn it to a mere colour. If one concerts with an executor,

(*d*) M'Leod *v.* Drummond, 14 Ves. jun. 353; 17 Ves. jun. 152; and see Farr *v.* Newman, 4 Term Rep. 621; Keane *v.* Roberts, 4 Madd. 332.

(*e*) See Ewer *v.* Corbet, 2 P. Wms. 148.

(*f*) Crane *v.* Drake, 2 Vern. 616; 7 Vin. 43, pl. 13; 18 Vin. 121, pl. 11, side notes; Bonney *v.* Ridgard, 2 Bro. C. C. 438, cited; Nugent *v.* Gifford, 1 Atk. 463; and see Gilb. Eq. Rep. 113; Prec. Ch. 434; and Whale *v.* Booth, 4 Term Rep. 625, n.

or

or legatees, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or in *any other manner*, (which Lord Eldon has said, are very material words) (*g*), contrary to the duty of office of executor, such concert will involve the seeming purchaser, and make him liable for the full value (*h*).

4. But if the legatee permit a long time to elapse without asserting his claim, and there are several mesne purchasers, equity will not set aside the sale, although there are suspicious circumstances of fraud (*i*).

5. And although the legatee has only a contingent interest, yet that will be no excuse for delay (*k*); because he has such an interest as will entitle him to know what debts the testator owed, and what part of his estate has been applied to the payment of them. And in Howorth *v.* Powell, it was laid down by Lord Keeper Henley, that a party having a claim in remainder to an estate, though not to the possession, if he sees the possession wrongfully usurped, ought to file his bill for relief before his right to possession accrues: for otherwise he stands by and countenances the possessor in his exercise of acts of ownership (*l*).

6. It remains to observe, that Lord Hardwicke thought (*m*) the reversal of the case of Humble *v.* Bill (*n*) might be proper, because the charge was upon a *particular*

(*g*) 17 Ves. jun. 167.

(*h*) *Per* Lord Thurlow, 2 Dick. 725; and see 1 Burr. 475.

(*i*) Bonney *v.* Ridgard, 2 Bro. C. C. 438; 17 Ves. jun. 97, cited; and see 17 Ves. jun. 165.

(*k*) Andrew *v.* Wrigley, 4 Bro. C. C. 125.

(*l*) Ch. T. T. 1758, MS.; 1 Eden, 351, nom. Howarth *v.* Deem.

(*m*) See Mead *v.* Lord Orrery, 3 Atk. 241; and see 17 Ves. jun. 161, 162.

(*n*) *Supra*, p. 518.

part

part of the estate: his Lordship not, however, meaning to impugn the general doctrine, which he frequently admitted, and indeed carried further than any other judge.

This distinction Lord Hardwicke appears to have been inclined to follow in a case *(o)* where a specific legatee of a mortgage brought a bill to foreclose against the representative of the mortgagor, who pleaded an account settled between him and the executor of the mortgagee, and a release. For his Lordship thought the devisee had a specific lien on the estate, and as the mortgagor had notice of the bequest, he was bound by it. And he was inclined to overrule the plea of the release; but the case of Ewer *v.* Corbet (*p*) being cited, it was ordered to stand for an answer, with liberty to except. The case was afterwards debated on several days, and the Chancellor ultimately determined, that the plaintiff had not equity sufficient to support his bill, and accordingly dismissed it, but without costs (*q*).

Upon principle as well as upon the authority of Langley and Lord Oxford, the better opinion clearly is, that a particular chattel specifically bequeathed may be purchased from an executor, but certainly, in most cases, such a purchase could not be recommended without the concurrence of the legatee, because, independently of the general question, the executor may have assented to the bequest (*r*).

7. But of course this question cannot arise, where the specific legatee of the chattel is also executor *(s)*.

(*o*) Langley *v.* Earl of Oxford, Ambl. 17; and see Elliot *v.* Merryman, Barnard. Ch. Rep. 78; and Andrew *v.* Wrigley, 4 Bro. C. C. 125.

(*p*) *Supra*, p. 518.

(*q*) See Reg. Lib. B. 1747, f. 300.

(*r*) See Thomlinson *v.* Sir Finch, 378.

(*s*) Taylor *v.* Hawkins, 8 jun. 209.

CHAPTER XII.

OF THE VENDOR'S LIEN ON THE ESTATE SOLD FOR THE PURCHASE MONEY, IF NOT PAID.

I. WHERE a vendor delivers possession of an estate to a purchaser, without receiving the purchase money, equity, whether the estate be (*a*) (I) or be not (*b*) conveyed, and although there was not any special agreement for that purpose, gives the vendor a lien on the land for the money; so, on the other hand, if the vendor cannot make a title, and the purchaser has paid any part of the purchase money, it seems that he has a lien for it on the estate, although he may have taken a distinct security for the money advanced (*c*) (II).

And even where the agreement itself provides for the security of the purchase money, by a bond to remain at interest during the purchaser's life, the seller will not lose his lien. The case was held not to be distinguishable

(*a*) Chapman *v.* Tanner, 1 Vern. 267; Pollexfen *v.* Moore, 3 Atk. 272; and see 1 Bro. C. C. 302. 424; and 6 Ves. jun. 483; Mackreth *v.* Symmons, 15 Ves. jun. 329.

(*b*) Smith *v.* Hibbard, 2 Dick. 730; Charles *v.* Andrews, 9 Mod. 152.

(*c*) Lacon *v.* Mertins, 3 Atk. 1.

(I) But note, that in Chapman *v.* Tanner (See Ambl. 726; 6 Ves. jun. 757), and Pollexfen *v.* Moore, there were special agreements that the vendor should keep the writings. Indeed, in the latter case, possession had not been delivered. See Mr. Sanders's note to the case in his edition of Atkins.

(II) As to chattels capable of delivery, as timber felled, see *ex parte* Gwyne, 12 Ves. jun. 379.

from the common case of an agreement, made after the written agreement, to take a bond (*d*).

But equity will not raise this equitable lien in favour of a papist incapable of purchasing (*e*), for that would give him an interest in land.

If a vendor take a distinct and independent security for the purchase money, his lien on the estate is gone; such a security is evidence that he did not trust to the estate as a pledge for his money (*f*).

Thus, upon the sale of an estate, the vendor accepted some stock for the money (*g*), with an agreement, that in case it did not within a limited time produce a sum named, the purchaser should make it up that sum. The stock proved deficient; and Sir William Grant held, that the vendor had no lien on the estate for the deficiency: he thought that the vendee could not have any motive for parting with his stock, but to have the absolute dominion over the land. It was impossible, his Honor said, that it could be intended that the vendor should have this double security, an equitable mortgage and a pledge, which latter, if the stock should rise a little, would be amply sufficient to answer the purchase money.

And the same rule must, it has been said, prevail where a vendor accepts a mortgage of another estate for the purchase money, the obvious intention of burthening one estate being, that the other shall remain free and unincumbered (*h*); so, even where the vendor takes a mortgage of the estate sold for only part of the purchase money; because, by taking a mortgage for part, he clearly evinces

(*d*) Winter v. Lord Anson, V. C. 27 Nov. 1821, MS.

(*e*) Harrison v. Southcote, 2 Ves. 389.

(*f*) See 6 Ves. jun. 483; and see the observations of Lord Eldon on this case in 15 Ves. jun. 348, 349.

(*g*) Nairn v. Prowse, 6 Ves. jun. 752; but see Lord Eldon's observations, *post*.

(*h*) See Nairn v. Prowse; but see 15 Ves. jun. 341.

evinces his election, that the estate should be charged with that part only (*i*).

Lord Eldon, however, has said, that it did not appear to him a violent conclusion as between vendor and vendee, that notwithstanding a mortgage, the lien should subsist (*j*). It must not, he added, be understood, that a mortgage taken is to be considered as a conclusive ground for the inference, that a lien was not intended, as he could put many instances, that a mortgage of another estate for the purchase money, would not be decisive evidence of an intention to give up the lien, though in the ordinary case, a man has always greater security for his money upon a mortgage, than value for his money upon a purchase; and the question must be, whether, under the circumstances of that particular case, attending to the worth of that very mortgage, the inference arises. In the instance of a pledge of stock, does it necessarily follow that the vendor consulting the convenience of the purchaser, by permitting him to have the chance of the benefit, therefore gives up the lien which he has? The doctrine, as to taking a mortgage or pledge, would be carried too far, if it is understood as applicable to all cases, that a man taking one pledge, therefore necessarily gives up another, which must, his Lordship thought, be laid down upon the circumstances of each case, rather than universally (*k*).

But it seems, that taking a covenant, bond or note, for the purchase money, will not affect the vendor's lien.

This was settled by the case of Hearne *v.* Botelers (*l*)

(*i*) Bond *v.* Kent, 2 Vern. 281. See 1 Scho. and Lef. 135.

(*j*) See 15 Ves. jun. 341; and see Cowell *v.* Simpson, 16 Ves. jun. 278. 280.

(*k*) Mackreth *v.* Symmons, 15 Ves. jun. 348, 349.

(*l*) Cary's Rep. Cha. 25; and see Tardiffe *v.* Scrughan, 1 Bro. C. C. 422, cited; and Harrison *v.* Southcote, 2 Ves. 389.

where

where a bond was taken for the money, and some of it remained unpaid, and the bond was lost; for the opinion of the Court was to charge the defendants, *in regard of the land in their possession*, with the payment thereof; on the ground, it should seem, that taking a bond did not deprive the vendor of his equitable lien; for unless he had such a lien, the loss of the bond would hardly be a ground to charge the money on the estate *(m)*.

So, in Gibbons *v.* Baddall *(n)*, it was said, that if *A* sells an estate, and takes a promissory note for part of the purchase money, and then the purchaser sells to *B*, who has notice that *A* had not received all his purchase money, the land in equity is chargeable in the hands of *B*, with the money due on the note. In this case, therefore, the existence of the equitable lien was considered as a point perfectly settled.

But in Fawell *v.* Heelis *(o)*, where a receipt was indorsed on the deed for the purchase money (I), although it was not actually paid, and the vendor took a bond for the purchase money, Lord Bathurst held that he had thereby departed with his lien. He said, he did not find an instance where a bond had been taken for the consideration money (*p*). It was evident the vendor had an opinion of the purchaser at the time, otherwise he would

(*m*) But see 15 Ves. jun. 338. 343, *per* Lord Eldon.

(*n*) 2 Eq. Ca. Abr. 682, n. (b) to (D.) *Ex parte* Peake, 1 Madd. 346.

(*o*) Ambl. 724; 1 Bro. C. C. 421, n.; 2 Dick. 485.

(*p*) *Vide* Hearne *v.* Botsler, and Gibbons *v.* Baddall, *ubi supra*.

(I) This of course could not make any difference in the case, for a receipt for the purchase money, although signed by the seller, is in equity of no avail if the money be not actually paid. See Coppin *v.* Coppin, 2 P. Wms. 291; but at law the receipt cannot be got over, Rowntree *v.* Jacob, 2 Taunt. 141, unless merely fraudulent, Henderson *v.* Wild, 2 Campb. 561; and in equity payment will be presumed after a great length of time, Bidlake *v.* Arundel, 1 Cha. Rep. 93.

not

not have let the money remain in his hands. I consider it, he added, as a transaction distinct, and independent of the purchase: he lends him the money, and he chooses his security, and I think he must abide by it; therefore let the bill be dismissed.

In a subsequent case (*q*), however, Lord Rosslyn was decidedly of opinion against the doctrine laid down by Lord Bathurst. After commenting on other cases, he said, the case of Fawell and Heelis remained; there Lord Bathurst doubted whether there was such an equitable lien; it became, therefore, of great consequence that it should be spoken to. It struck him always, he said, that there was such a lien, and that it was so from the foundation of the court. A bargain and sale must be for money paid. If an estate is sold, and no part of the money paid, the vendee is a trustee: then, if part be paid, was it not the same as to that which was unpaid?

In the late case of Nairn *v.* Prowse (*r*), the Master of the Rolls seemed to incline to the same opinion. He said, that by conveying the estate without obtaining payment, a degree of credit was necessarily given to the vendee. That credit might be given upon the confidence of the existence of such a lien. The knowledge of that might be the motive for permitting the estate to pass without payment. Then it may be argued, that taking a note or bond cannot materially vary the case. A credit is still given to him, and may be given from the same motive; not to supersede the lien, but for the purpose of ascertaining the debt, and countervailing the receipt indorsed upon the conveyance.

And in a case where a receipt was given for the whole

(*q*) Blackburn *v.* Gregson, 1 Cox, 90; 1 Bro. C. C. 420; and see Tardiffe *v.* Scrughan, *ibid.* 423, cited; and 15 Ves. jun. 336, 337.

(*r*) 6 Ves. jun. 752.

purchase

nature of a bill of exchange; it is an order by the drawer for the payment of money which he has in the hands of the drawee to the holder of that bill. The acceptor, by his acceptance, acknowledges that he has money belonging to the drawer in his hands, and engages to have that money forthcoming according to the requisition of the bill. The acceptor is never considered as a surety for the debt of another. By accepting he admits himself to be a debtor to the drawer. The subject of the bill is, in contemplation of law, the drawer's own money, which he authorizes the creditor to receive instead of receiving it himself, and afterwards handing it over to such creditor.

And in such cases it is not important that the note or bill has been negotiated (*x*).

The same point seems to have been decided in Comer *v.* Walkley (*y*). A trustee sold an estate for 720*l.*: 600*l.* was left in the purchaser's hands as an indemnity against an annuity; and a deed was entered into between him and the trustee, whereby he covenanted to pay interest on the 600*l.* and when the annuity should cease or be discharged, to pay the money to the trustee. By several conveyances, &c. the estate became again vested in trustees, upon trust to sell; and they sold the estate to a purchaser, who objected to complete his contract without the concurrence of the person entitled to the residue of the 600*l.* then unpaid. Two bills were filed, one by the person entitled to the residue of the 600*l.* against the purchaser and others, for payment of it; and the other by the purchaser, who had been in possession twenty-two years, for a specific performance, which was accordingly decreed, and his costs in both causes were allowed. The proper accounts of the personal estate were directed to be taken in the first cause; but the question, out of what

(*x*) *Ex parte* Loaring, 2 Rose, 79.

(*y*) Reg. Lib. A. 1784, fol. 625; *vide supra*, p. 512.

estates any deficiencies should be made good, was reserved: so that it does not appear that the Court held the money to be a lien on the land any further than by giving the purchaser his costs in both causes; which circumstance alone is, however, conceived to be decisive. And the question has received the same decision in a recent case before Lord Eldon, after an elaborate review of all the authorities (*z*).

Upon the whole, therefore, it seems quite clear, that taking a covenant, bond or note, for the purchase money, or any part of it, will not discharge the vendor's equitable lien on the estate. And it seems that the same rule must prevail although the estate is sold for an *annuity*, and a covenant, bond or note is taken for securing the payment of it (*a*).

In Elliot *v.* Edwards (*b*), the vendor assigned a leasehold estate to the purchaser, upon payment of part of the purchase money. The purchaser and another person as his surety, covenanted for payment of the residue of the purchase money; and in the assignment was contained a proviso, that the estate should not be assigned until all the money was duly paid, without the joint consent of the vendor and the surety. Lord Alvanley was of opinion, that the vendor had an equitable lien, and that till the money was paid, equity would not compel a specific performance of any agreement by the assignee for sale of the estate.

In Blackburn *v.* Gregson (*c*), Lord Rosslyn, as we have seen, said, that if an estate is sold, and no part of the

(*z*) Mackreth *v.* Symmons, 15 Ves. jun. 329. The case has since been reheard by the Lord Chancellor, with the assistance of two judges, and now stands for judgment.

(*a*) See Tardiffe *v.* Scrughan, 1 Bro. C. C. 423, cited; but see Mackreth *v.* Symmons, 15 Ves. jun. 329, which, however, was a very particular case.

(*b*) 3 Bos. and Pull. 181.

(*c*) 1 Bro. C. C. 424.

money

money paid, the vendee is a trustee: from which it might perhaps be inferred, that a vendor has always an equitable lien where *no part* of the purchase money is paid: but this cannot be considered as a general rule; it being clear, that a vendor may depart with his lien, although no part of the purchase money be paid. Indeed the same rules seem to prevail on this subject, whether the whole, or only part of the purchase money, remains unpaid.

Where a security by bond or note is given for the purchase money, and it is intended that the vendor shall not have a lien on the estate for the money, a declaration to that effect should be inserted in the conveyance; which would effectually prevent equity from raising a lien upon the *presumed* intention of the parties.

II. It must be remarked, that although equity raises this lien in favour of a vendor, yet it is not extended to third persons; that is, where the vendor is satisfied out of the personal estate of the purchaser, in exclusion of a third person, that person cannot resort to the equitable lien of the vendor on the estate; or, in other words, cannot require the purchased estate and the personal estate to be marshalled.

Thus, in the case of Coppin *v.* Coppin (*d*), a younger brother purchased an estate of his elder brother, but part of the purchase money was not paid. The purchaser made his will, charging his estate with great legacies; but the will was attested by only two witnesses; afterwards the purchaser died, leaving his brother, the vendor, his heir and executor; and it was holden by Lord Chancellor King, that he had an equitable lien on the land;

(*d*) Coppin *v.* Coppin, Sel. Cha. Ca. 28; 2 P. Wms. 291.

 that

that he was entitled to retain the purchase money out of the assets; and that the legatees could not stand in his place with respect to the equitable lien.

There is an important case on this subject, which demands particular attention. The case to which I allude is Pollexfen *v.* Moore (*e*). It appeared that Thomas Moore purchased an estate from Pollexfen, and had not paid all the purchase money; he devised the estate to Kemp, and, subject to some legacies, made Kemp his residuary legatee and executor. Kemp wasted the personal estate and died; whereupon the purchased estate descended to Boyle Kemp, his son and heir at law. Pollexfen filed his bill for payment of the remainder of the purchase money. Mrs. Moore, a legatee in Thomas Moore's will, brought a cross-bill, praying that if the purchase money should be paid out of the personal estate, she might stand in the purchaser's place as to his lien on the land. Lord Hardwicke admitted that Pollexfen had a lien on the estate for the remainder of the purchase money. But he said, that this equity would not extend to a third person, but was confined to the vendor and vendee only; and if the vendor should exhaust the personal assets of Moore and Kemp, the defendant would not be entitled to stand in his place, and to come upon the purchased estate in the possession of Kemp's heir. But then the heir should not avail himself of the injustice of his father, who had wasted the assets of Moore, which should have been applied in paying the defendant's legacy. Therefore, Lord Hardwicke added, that the estate which had descended from Kemp, the executor of Moore, upon Boyle Kemp, came to him liable to the same equity as it would have been against the father, who had misapplied the personal estate; and in order to relieve Mrs. Moore, he would

(*e*) 2 Atk. 272.

direct

direct Pollexfen to take his satisfaction upon the purchased estate, because he had an equitable lien both upon the real and personal estate; and would leave this last fund open, that Mrs. Moore, who could at most be considered only as a simple contract creditor, might have a chance of being paid out of the personal assets.

The decree was general, that the residue of the purchase money and interest should in the *first place* be paid out of the personal estate of the said Thomas Moore; but that in case it should appear that Moore did not leave assets to pay what should be so due for the residue of the purchase money, *and all his other debts, legacies and funeral expenses*; or if the personal estate of Moore was not then sufficient, by reason that the assets of Kemp were not sufficient to answer such part thereof as came to his hands, then such deficiency, "*so far as the personal estate of the said Thomas Moore shall be applied in payment of the said purchase money* (I)," should be made good out of the purchased estate, and a competent part thereof was decreed to be sold accordingly.

Now in this case Lord Hardwicke, in giving judgment, clearly agreed with the decision in Coppin *v.* Coppin, that this equity did not extend to a third person. According to the judgment, his Lordship deviated from that rule in the case before him, on the ground of fraud. But Lord

(I) The decree has generally been considered at variance with the judgment. In the first edition of this work, the author stated, that he could not see the principle upon which the decree was made, if it were correctly stated, that if the purchaser did not leave assets to pay the purchase money, *and all his debts, funeral expenses and legacies*, the deficiency was to be made good out of the purchased estate. See 3 Atk. 273, n. 3, last edition. Upon searching the Register's book, it appears that the decree was qualified as stated in the text; and this emendation, with the observations in the text, will, it is hoped, conduce to a right understanding of this case. See Reg. Lib. B. 1745, fol. 283.

said, that the cases of marshalling seem to have gone this length: that, where there is a charge upon an estate descended, a legatee shall stand in the place of the person having that charge, resorting to the personal estate. His Lordship, however, gave no opinion upon the point, although it is clear that the inclination of his opinion was in favour of the legatee under the general rule (*h*). In a still later case the very point came before the Master of the Rolls, and called for a decision (*i*). The only case cited was Pollexfen *v.* Moore, as reported in Atkins. His Honor said, that it was a very obscure report; and it had perplexed him very much formerly. The decision was against that *dictum* of Lord Hardwicke. This could not be distinguished from the common case of marshalling; that a person having resort to two funds shall not by his choice disappoint another, having one only: and a decree was pronounced accordingly.

The reader will observe, that the case of Coppin *v.* Coppin was not cited in either of the foregoing cases; and should the observations which have been made on Pollexfen *v.* Moore be thought correct, it would seem that Lord Hardwicke's decision was not in opposition to his *dictum* in the same case, expressive of the rule established by Lord Chancellor King. Perhaps the common case of marshalling may be thought not to apply to the point in question, when it is considered that the equitable lien was originally raised *by the construction of equity in favour of the vendor only*, and not in favour of third persons. It seems to have been thought in Coppin *v.* Coppin, and apparently with some reason, that extending the vendor's lien to third persons would be breaking in upon the statute of frauds. The general rule as to marshalling applies to

(*h*) See Austen *v.* Halsey, 6 Ves. jun. 475; and see Cox's n. (1) to 2 P. Wms. 295.

(*i*) Trimmer *v.* Bayne, 9 Ves. jun. 209; and see Headley *v.* Readhead, Coop. 50.

cases where the person resorting to the personal estate has an actual charge or lien on the real estate: but in this case, if *equity* first deems the purchaser a trustee for the vendor as to so much of the estate as will satisfy the purchase money unpaid, and then permits a disappointed legatee to stand in the place of the vendor, it is creating a charge on the land in direct opposition to the statute of frauds. On sale of the estate, the purchase money becomes a debt payable out of the purchaser's personal estate; and the equitable lien ought, it is conceived, to be extended to only so much of the purchased estate as the personal estate is insufficient to answer. The vendor has not an original charge on the estate, but only an equity to resort to it, in case the personal estate prove deficient. In this view of the case an independent substantive charge on the land is, in fact, created by equity in favour of a legatee, although, if the legacy was actually imposed on the estate by a will not duly executed according to the statute of frauds, the Court is bound to say, that the will cannot be read as to the charge.

It is with great deference that these observations are submitted to the reader, after the high opinions which have been given upon this point; but as the case of Coppin *v.* Coppin was not cited in the recent cases, and the effect of a decision overruling that of Lord Chancellor King, does not appear to have presented itself to the mind of the Court, it still seems open to contend, that the equity under consideration cannot be extended to a third person, unless by reason of a fraud, or on the ground of the vendor having an equitable mortgage on the estate.

Since these observations were written, Lord Eldon, in deciding the general question of lien, observed that he had some doubt upon another point, whether the Court will in case of the death of the vendee marshal the assets,

so as to throw the lien on the purchased estate. It has been often said, and the case of Coppin *v.* Coppin stated as an authority, that a Court will not do that. The Lord Chancellor in his judgment takes no notice of that point. In that case the heir happened to be the heir of the vendee, so that the estate was at home, and it was held that being also the executor, he was entitled to retain the purchase money out of the personal assets. That decision requires a good deal of consideration. If the estate had been in a third person, the general doctrine as to a person having two funds to resort to, might be thought to have an immediate application, and the express terms of the decree in Pollexfen *v.* Moore, might be found very inconsistent with it (*j*). On a subsequent occasion, Lord Eldon observed, (in allusion to Lord Hardwicke's observation in Pollexfen *v.* Moore, before noticed), that if the meaning was that he (Lord H.) would follow the case of Coppin *v.* Coppin, and that if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there is great difficulty in applying the principle, as it would then be in the power of the vendor to administer the assets as he pleases: having a lien upon the real estate to exhaust the personal assets, and disappoint all the creditors; who, if he had resorted to his lien, would have been satisfied, and in that respect, with reference to the principle, the case is anomalous (*k*).

III. The observation of Lord Hardwicke before noticed, that this equity would not extend to a third person, but was confined to the vendor and vendee only, is frequently adduced to prove, that the lien does not exist when the estate passes into the hands of a third person; but by the

(*j*) 15 Ves. jun. 338, 339. (*k*) 15 Ves. jun. 345.

latter

latter part of the same passage (*l*), it clearly appears, that this was not Lord Hardwicke's meaning; and in Walker *v.* Preswick (*m*), Lord Hardwicke said, that this lien prevailed against the purchaser, his heir, or any claiming under him, with notice of this equitable title; which evinces his meaning to be, that the purchased estate, and the personal estate of the purchaser, could not be marshalled in favour of a third person, although, as we have seen, he allowed it in Pollexfen *v.* Moore, by reason of the equitable mortgage.

It appears then, that this equitable lien prevails against the purchaser and his heir, and all persons claiming under him with notice, although for valuable consideration (*n*).

But it of course would not prevail against a *bonâ fide* purchaser without notice: and the mere deduction of the title to the estate from the first vendor by recital, will not be sufficient to affect him, for that does not show it was not paid for (*o*).

Persons coming in under the purchaser by act of law, as assignees of a bankrupt (*p*), are bound by an equitable lien, although they had no notice of its existence; because, as the Master of the Rolls observes on another point, the assignment from the commissioners, like any other assignment by operation of law, passes the rights of a bankrupt precisely in the same plight and condition as he possessed them. Even where (as in this instance) a complete legal title vests in them, and there is notice of

(*l*) *Vide supra*, p. 532.

(*m*) 2 Ves. 622.

(*n*) Hearn *v.* Botelers, Cary's Cha. Rep. 25; Walker *v.* Preswick, 2 Ves. 622; Gibbons *v.* Baddall, 2 Eq. Ca. Abr. 682, n. (b) to (D); Elliot *v.* Edwards, 3 Bos. and Pull. 181; Mackreth *v.* Symmons, 15 Ves. jun. 329.

(*o*) See 1 Bro. C. C. 302.

(*p*) Blackburne *v.* Gregson, 1 Bro. C. C. 420; Bowles *v.* Rogers, 6 Ves. jun. 95, n. (a); *Ex parte* Hanson, 12 Ves. jun. 346.

an

quity affecting it, they take, subject to whatever equity bankrupt was liable to (*q*).

ut where a trustee for infants, to sell the lease of a house, plant and fixtures, contracted to sell them and he purchaser into possession, and upon a bill filed by trustee there was a decree for a specific performance, the purchaser became bankrupt before the money was l, the Vice-Chancellor held that there was no lien inst the plant, which fell within the provision of the ac. I. c. 19 (*r*).

nd creditors claiming under a conveyance from the chaser, are bound in like manner as assignees (*s*), be- se they stand in the same situation as creditors under mmission.

n Nairn *v.* Prowse (*t*) the question arose, whether the of which we are now treating, should prevail against equitable mortgage, by deposit of title-deeds; but the e went off on another ground, and the point was not ided. In Stanhope *v.* Earl Verney (*u*), Lord North- ton held, that a declaration of trust of a term in favour a person, was tantamount to an actual assignment; ess a subsequent incumbrancer, *bonâ fide*, and without ice, procured an assignment; and that the custody of deeds respecting the term, with a declaration of the st of it in favour of a second incumbrancer, was equi- ent to an actual assignment of it; and therefore gave n an advantage over the first incumbrancer, which ity would not take from him.

Now it must at one view be seen how strong the ana- y is between the point in question and this case. The

) See 9 Ves. jun. 100; 2 Ves. Bea. 309.

) *Ex parte* Dale, 1 Buck, 365.

) Fawell *v.* Heelis, Ambl. 724; see 1 Bro. C. C. 302.

(*t*) 6 Ves. jun. 752; see 2 Ves. and Bea. 149.

(*u*) Butler's note (1) to Co. Litt. 290, b. Ch. July 27, 1761.

only

only difference between them appears to be, that in the case before Lord Northington, both the trusts were declared by the parties; whereas in the case under consideration, the trust or lien is raised by equity, and not by express declaration, and the trust or equitable mortgage is generally created by the declaration of the parties; which circumstance, if it turn the scale either way, is certainly in favour of the mortgagee: so that, upon the authority of this case, we may perhaps venture to say, that an equitable mortgage, by deposit of deeds to a person, *bonâ fide*, and without notice, will give him a preferable equity; and will overreach the vendor's equitable lien on the estate for any part of the purchase money (*x*).

A deposit of title-deeds by a simple contract debtor of the crown, for securing part of the purchase money for another estate, binds the crown as an equitable mortgage, although the purchaser also give his bond to the seller for the money (*y*).

Before closing this subject it may be observed, that if a purchaser deposit the deeds with a third person, as a collateral security for part of the purchase money, the seller, although he obtain possession of the conveyance to him from the depositary, and pledge it to persons who advance money upon it *bonâ fide*, cannot give them a lien beyond the amount of the purchase money actually unpaid (*z*).

(*x*) In Mackreth *v.* Symmons, 15 Ves. jun. 329, there was no deposit of the deeds.

(*y*) Casberd *v.* Ward, 6 Price, 411.

(*z*) Hooper *v.* Ramsbottom, 4 Camp. Ca. 121; 6 Taunt. 12.

CHAPTER XIII.

OF THE CONSTRUCTION OF COVENANTS FOR TITLE.

SECTION I.

Where they run with the Land.

IN a preceding chapter we have seen to what covenants a purchaser is entitled (*a*); and we are now to consider the construction of covenants entered into by a vendor.

Covenants for title are termed real covenants, and pass to the assignees of the land by the common law, who may maintain actions upon them against the vendor and his real and personal representatives (*b*) (I). And as the covenants

(*a*) Ch. 9.

(*b*) Middlemore *v.* Goodale, 1 Ro. Abr. 521, (K.) pl. 6; Cro. Car. 503. 505; Sir Wm. Jones, 406; Campbell *v.* Lewis, 3 Barn. and Ald. 392.

(I) A respectable writer has observed, that *cestuis que use* are grantees within the statute 32 Hen. VIII. c. 34; and are therefore entitled to the benefit of all covenants entered into by persons selling lands, for securing the title of such lands, 4 Cruise's Dig. p. 80, s. 44. The statute of Henry, however, appears only to relate to covenants which are a charge upon or incident to reversions; and a purchaser of a reversion is under this act clearly entitled to the benefit of covenants entered into by a lessee with the vendor, although the estate is vested in him by way of use under the statute of uses; because, this last statute puts him in the place of his feoffee. Lee *v.* Arnold, 4 Leo. 27; S. C. Mo. 97, nom. Appowel *v.* Monnoux; Roll *v.* Osborne, Mo. 859. Where an estate is upon a purchase conveyed to *A* to uses, the covenants for title ought to be entered into with *A*. The statute of uses will of course turn the uses into possessions,

covenants relate to the land, it seems that an assignee may maintain an action on the covenants, although the covenants were entered into with the original grantee and his heirs only *(c)*; and the right of action, even for a breach in the ancestor's life-time, will descend to the heir, and not to the executor, where no actual damage was sustained by the ancestor *(d)*. So covenant will lie by the devisee of lands in fee, though broken in the testator's life-time. For the covenant passes with the land to the devisee, and is broken in the time of the devisee; for so long as the seller has not a good title, there is a continuing breach. And it is not like a covenant to do an act of solitary performance, which not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require *(e)*.

And as covenants entered into by a vendor with a purchaser run with the land in the possession of his representatives or assignees, so on the other hand covenants entered into by a purchaser with the vendor, respecting the land, will also run with the land, and charge the representatives or assignees of the purchaser in respect of it.

It is not, however, sufficient that a covenant is concerning the land; but in order to make it run with the land, there must be a privity of estate between the covenanting

(*c*) Co. Litt. 384, b. 385, a; Spencer's case, 5 Rep. 16; Bally v. Wells, 3 Wils. 25; Tatem v. Chaplin, 2 H. Blackst. 133.

(*d*) Kingdon v. Nottle, 1 Mau. and Selw. 355; King v. Jones, 5 Taunt. 418; 1 Marsh. 167; 4 Mau. and Selw. 188.

(*e*) Kingdon v. Nottle, 4 Mau. and Selw. 53.

possessions, and the *cestuis que trust* will then be deemed assignees, and may take advantage of the covenants by force of the common law, just as if the statute of uses had not been passed, and the estate had been conveyed to them at once by *A*. This, therefore, appears to be wholly independent of the statute of 32 Henry VIII.

parties

as (*f*). Therefore, it seems that if the estate was, e time of the conveyance, mortgaged in fee, and the haser should enter into a covenant respecting the land the vendor, the covenant would not bind the assignees as land, but would be a mere covenant in gross; for vendor would, in contemplation of law, be a mere ger, and consequently there could be no privity of e between him and the purchaser.

ad even where there is a privity of estate at the time he covenant, yet if a subsequent purchaser do not the estate of the original purchaser, he will not be id by the covenant. It seems difficult to conceive this case can exist. It occurred, however, in the late of Roach *v.* Wadham (*g*); an estate was conveyed dh uses as the purchaser should appoint; and in de- t of appointment, to himself in fee, yielding and pay- to the vendors, their heirs and assigns, a perpetual sum rent, which rent the purchaser, for himself, his s and *assigns*, covenanted to pay; the estate was wards conveyed to a purchaser; and as it was holden, the purchaser was in under the power, and not by e of the first purchaser's estate, it was admitted, on nds, that an action brought against him by the ori- l vendor, for the fee-farm rent, was not maintainable, e had not the estate of the first purchaser, but took the original conveyance had been made to himself. decision leads to the observation, that wherever a haser is to enter into a covenant, which it is intended run with the land, the vendor ought to insist upon purchaser taking a conveyance in fee, and should not mit the estate to be limited to the usual uses to bar er.

) *Per* Lord Kenyon, Webb *v.* ell, 3 Term Rep. 393; Stokes ssell, *ibid.* 678; affirmed in the Exchequer Chamber, 1 H. Blackst. 562.

(*g*) 6 East, 289.

The

chaser might have been held to have come in under, and to stand in the place of the first purchaser, so as to satisfy the rule of law, although he did not actually, as it was determined, take the estate of the first purchaser (*i*). The point, however, was considered as clear, and was not discussed either at the bar or upon the bench.

SECTION II.

Of their general Construction.

It hath already been observed (*k*), that the covenants usually entered into by a vendor, seised of the inheritance, are, 1st, that he is seised in fee: 2dly, that he has power to convey: 3dly, for quiet enjoyment by the purchaser, his heirs and assigns: 4thly, that the land shall be holden free from incumbrances: and lastly, for further assurance.

The five covenants are several and distinct, but the first and second of them are synonymous; for if a man be seised in fee, he has power to sell (*l*). But the converse of this proposition is not universally true (*m*).

A man having merely a power to appoint an estate, cannot be said to be seised in fee of the estate, although he has a right to convey; and accordingly, in cases of this nature, it is usual to omit the first covenant, and to insert a covenant, that the power was well created, and is not suspended or extinguished.

(*i*) See and consider Co. Litt. 215, b. s. 10; Glover v. Cope, 1 Show. 284; Hurd v. Fletcher, Dougl. 43; Duke of Marlborough v. Lord Godolphin, 2 Ves. 61; and see 3 Wils. 26, at the bottom.

(*k*) *Supra*, ch. 9.

(*l*) Nervin v. Munns, 3 Lev. 47; Browning v. Wright, 2 Bos and Pull. 13.

(*m*) See 4 Cruise's Dig. 78, s. 30

1. it might open a door to fraud, for the purchaser might secretly procure a stranger to make a tortious entry, that he might charge the covenantor with an action. And here is a case in the year-books in the reign of Hen. VIII. where the question was, whether a general covenant in a lease should extend to an eviction by one who had no right. Englefield said, that he should not have a writ of covenant against his lessor when he is ousted by tort, for there is no mischief, because he may have a writ of trespass, or an *ejectione firmæ* against the person who ousted him; but if he was ousted by one who had a title paramount against whom he could have no relief, then he may have a writ of covenant against his lessor, *Quod fuit concessum per plusieurs* (*q*).

2. But where a vendor covenants to indemnify a purchaser against a particular person by name, there it seems that the covenant shall extend to an entry by that person, be it by *droit* or *tort*, for it is to be presumed that such person had an interest (*r*).

3. And where the covenantor himself does any act asserting a title, it will be a breach of the covenant, although he covenanted against *lawful* disturbances only, and the act done by him was tortious, and might be the subject of an action of trespass (*s*). The contrary, however, was formerly holden (*t*). It must, nevertheless, be an act asserting a title; therefore, if the seller went on the estate to sport, the purchaser could not maintain covenant (*u*).

(*q*) T. 26 H. 8, pl. 11.

(*r*) Foster v. Mapes, Cro. Eliz. 12; Hob. 35; 1 Ro. Abr. 430, pl. 3. See Hayes v. Bickerstaff, Vaugh. 118.

(*s*) Lloyd v. Tomkies, 1 Term Rep. 671; Crosse v. Young, 2 Show. 425. S. C. MS.

(*t*) Davie v. Sacheverell, 1 Ro. Abr. 429, pl. 7.

(*u*) See Seddon v. Senate, 13 East, 72.

4. So a covenant against all claiming or *pretending to claim* any right extends to a tortious eviction (*v*).

5. And whatever opinion may anciently have been entertained (*x*), yet it is now clear, that a suit in equity, by which the purchaser is disturbed, is within a covenant for quiet enjoyment against disturbances generally (*y*). It is, however, customary to expressly extend covenants for title to *equitable* charges, disturbances, &c.

6. In a case where the seller covenanted generally that he was seised in fee, without any condition, &c. or any other estate, matter, cause, restraint, or thing whatsoever, whereby to alter, bar, change, charge, burthen, impeach, incumber or determine the same, and had good right to convey the same. It appeared that the lady of the manor had actually demised a small part of the land sold for ninety-nine years, determinable on lives, and the lessees had entered and continued to enjoy the estates. It was held that the lease was made by mistake, and did not amount to a disseisin, and that the covenant did not extend to the leases. It was said, what can a man be supposed to covenant against beyond the validity of the title! and most assuredly not against these surreptitious pocket leases. The action of covenant, it was added, only extended to the consequence of legal acts, and the reason is to be found in the case of Hayes *v.* Bickerstaff, that the law shall never judge that a man covenants against the wrongful acts of strangers (*z*).

It will be observed, that the leases were accompanied

(*v*) Chaplain *v.* Southgate, 10 Mod. 384; Com. 230; Perry *v.* Edwards, 1 Str. 400.

(*x*) Selby *v.* Chute, Mo. 859; 1 Brownl. 23; Winch, 116; 1 Ro. Abr. 430, pl. 15; and see 3 Leo. 71, pl. 109.

(*y*) Calthorp *v.* Hayton, 2 Mod. 54; Hunt *v.* Danvers, Raym. 370.

(*z*) Jerritt *v.* Weare, 3 Price, 575.

with

with actual possession by the lessees, who had expended money on the property. They were therefore within the covenant, and unless the covenants were held to extend to them, general covenants for title would be waste paper.—They are always intended to guard against a title adverse to the covenantor's, although it may not be a lawful title. Clearly the leases were a charge on the property *at the time of the conveyance*, and an ejectment at all events was necessary to dispossess the lessees. They therefore were an incumbrance within the covenant. It is not like the case of interruptions by persons not claiming lawfully subsequently to the conveyance.

7. A covenant for right to convey extends not only to the title of the covenantor, but also to his capacity to grant the estate. Therefore, where, upon a conveyance by a man and his wife, the husband covenanted that they had good right to convey the lands, and the wife was under age, the covenant was adjudged to be broken (*a*).

In respect to the persons against whose acts limited covenants will extend, it seems that,

1. A covenant for quiet enjoyment against *A*, and any other person by his means, title or procurement, is broken by the entry of a person in whose name *A* purchased jointly with his own name (*b*).

2. In this case Mr. Justice Doddridge put many cases. If a tenant in tail, to whom the estate tail was made, makes an estate and covenants as before, and the issue ousts the covenantee, the covenant is broken, because, being his purchase, the descent to his issue is by his means, although not by his title. But if the issue make

(*a*) Nash *v.* Ashton, Sir Tho. Jones, 195.

(*b*) Butler *v.* Swinnerton, Palm. 339; Cro. Jac. 657.

an estate and covenant, and the issue of the issue enter, it is not broken, because they are not in by his means, but by descent. But if there be a lessee for life, remainder over, and the lessee make an estate and covenant, and die, and he in remainder enter, it is not broken, because he is in by the feoffor, not by the lessee. But if a man enfeoff upon condition to be enfeoffed for life, remainder over, there it shall be otherwise, because by his procurement and means; *et sic de similibus*.

3. So if *A* covenant for quiet enjoyment against all claiming by, from or under him, a claim of dower by his wife is within the covenant; but otherwise, if the mother of *A* claim her dower, because she does not claim by, from or under him (*c*).

4. A covenant for quiet enjoyment against *A*, or any person claiming under him, extends to a person deriving title under an appointment made by *A*, by virtue of a power, in the creation of which he concurred, although the estate did not move from *A*, and the estate of the appointee is, according to the general rule, considered as limited to him by the deed creating the power.

This was settled in the case of Hurd *v.* Fletcher (*d*). Sir John Astley and his wife levied a fine of *her* estate to the use of Sir John for life, with power of leasing; remainders over, with a joint power of revocation to Sir John and Lady Astley. They exercised this power, and subject to the husband's life estate, and power of leasing and other uses, which afterwards determined, limited the estate to Lord Tankerville in tail. Sir John afterwards granted a lease not warranted by the power, and covenanted for quiet enjoyment by the lessee, without any interruption by him, or any person or persons claiming, or to claim by, from or under him. Lord Tankerville's

(*c*) Godb. 333; Palm. 340.

(*d*) Dougl. 43.

remainder

emainder in tail having fallen into possession, he evicted
ne lessee on account of the defective execution of the
ower, whereupon the lessee brought an action against
ir John's executors; and it was holden, that Sir John
as a necessary party to the second declaration of uses;
nd, therefore, Lord Tankerville claimed under him, and
ne eviction was within the covenant.

5. It may be proper to mention, that the case of Butler
. Swinnerton, which (to borrow an expression of Lord
enyon's) is the *magna charta* of the liberal construction
f covenants for title, is also stated in Shep. Touch. 171,
hich goes on to state, "and so it is also, if *A* purchase
nd of *B*, to have and to hold to *A* for life, the remainder
) *C*, the son of *A*, in tail, and after *A* doth make a lease
f this land to *D* for years, and doth covenant for the
uiet enjoying, as in the last case, and then he dieth; and
en *C* doth oust the lessee: in this case this was held to
e no breach of the covenant:" and for this position,
wan's case, M. 7 and 8 Eliz. is cited, and no reference
made to any other report of the case. Now this case,
it stands in Shep. Touch. (a book of acknowledged
thority) is in direct opposition to the decision in Butler
. Swinnerton; but from other reports of Swan's case (*e*),
appears that there was no *actual* covenant in the lease,
ut merely a covenant in law on the words "*concessit et
imisit*," and therefore the judges thought the action did
ot lie, because the covenant determined with the estate
f the lessee.

6. A covenant for quiet enjoyment, quietly and clearly
cquitted of and from all grants, &c. rents, rent-charges,
c. whatsoever, has been holden to extend to an annual
uit-rent payable to the lord of the manor, *and incident to*

(e) Mo. 74, pl. 204; Dy. 257, pl. 13; Bendl. 138, pl. 208; and
id. 12, pl. 25.

the tenure of the lands sold, although there was no arrear of the rent due (*f*).

7. A covenant for quiet enjoyment against any interruption of, from or by the vendor or his heirs, or any person whomsoever, legally or equitably claiming, or to claim any estate, &c. in the premises, by, from, under or in trust for him or them, or by, through or with his or their acts, means, *default*, privity, consent or procurement, was adjudged to extend to an arrear of quit-rent due at the time of the conveyance, although it was not shown that the rent accrued due during the time the vendor held the estate. For the Court said, if it were in arrear in his life-time, it was a consequence of law, that it was by *his default*; that is, *by his default* in respect of the party with whom he covenants to leave the estate unincumbered (*g*).

In this case it was argued by the counsel for the vendor, and apparently on very solid grounds, that to make the vendor liable to the arrear of this rent, under his covenant, would be tantamount to a decision that the covenant, although limited, should extend to the acts of all the world. The clear intention of the parties was, that the vendor should covenant against his own acts only; and yet it should seem that the argument of the Court would apply as well to a mortgage, or any other incumbrance created by a prior owner, as to an arrear of quit-rent, in payment of which a former occupier made default.—The reader should be cautious how he applies this decision to cases arising in practice, as it may lead him to draw conclusions not authorized by prior decisions.

8. We should be careful to distinguish the foregoing

(*f*) Hammond v. Hill, Com. 180.

(*g*) Howes v. Brushfield, 3 East, 491. See and consider Lord Alvanley's judgment in Hesse v. Stevenson, 3 Bos. and Pull. 565.

case

case from that (*h*) where the lessor, *reciting that he was seised of an estate of freehold and inheritance in the estate,* covenanted for quiet enjoyment against himself, his heirs, &c. or any other person or persons lawfully claiming by, from or under him, &c. or by or through his, their or any of their acts, means, *default* or procurement. The lessees were evicted by the remainder-man under a settlement, and it appeared that the lessor could have obtained the fee-simple by suffering a recovery. Lord Rosslyn considered it to be clear, that on eviction by any person claiming paramount to the lessor, they must, upon that eviction, have under the covenant in the leases satisfaction from his assets. The ground of this opinion must have been, that the eviction was owing to the *default* of the lessor, in not suffering a recovery. He assumed to be tenant in fee, and the nature of his title rested in his own breast; whether the default arose from fraud or negligence, was to the lessees immaterial.

II. We are now to consider in what cases restrictive words added to some of the covenants only, shall extend to all the covenants in the deed.

It may be first necessary to premise, that where covenants are limited to particular acts, as to the acts of the vendor for instance, the covenants are restrained in the following manner: "that for and notwithstanding any act, deed, matter or thing whatsoever, by him the said *A*, the vendor, made, done, committed or executed or knowingly or willingly suffered to the contrary thereof," he is seised in fee. And that, "for and notwithstanding any such act, deed, matter or thing whatsoever, as afore-

(*h*) Lady Cavan v. Pulteney, 2 Ves. jun. 544. See Reg. Lib. B. 1799, fo. 816.

said,"

said," he has power to convey. And that the purchaser, his heirs and assigns, shall quietly enjoy "without the interruption, &c. of *A*, or his heirs, or any person claiming by, from or under, or in trust for him or them." "And *that*" (I) free from incumbrances made or suffered "by *A*, or any person claiming by, from or under, or in trust for him." And lastly, that "*A*, and all persons claiming any estate in the premises by, from or under, or in trust for him," shall execute further assurances. But although this is the usual and technical manner of restraining covenants, yet an *agreement*, in any part of a deed, that the covenants shall be restrained to the acts of particular persons, will be good, although the covenants themselves are general and unlimited (*i*).

2. General covenants will not, however, be cut down, unless the intention of the parties clearly appears.

Therefore, in the case of Cooke *v.* Fowndes (*k*), where the vendor covenanted that he was seised of a good estate in fee, *according to the indenture made to him by B*, (of whom he purchased), it was determined to be a general covenant; for the reference to the conveyance by *B*, served only to denote the limitation and quality of the estate, and not the defeasibleness or indefeasibleness of the title.

In a modern case, where, in an assignment of a lease by executors, they had covenanted for quiet enjoyment

(*i*) Brown *v.* Brown, 1 Lev. 57. (*k*) 1 Lev. 40; 1 Keb. 95.

(I) This pronoun is used emphatically. You shall enjoy the estate, and *that* free from incumbrances. Dr. Johnson has extracted a passage from the Duty of Man, in which the word is used in the same sense: "We must direct our prayers to right ends; and *that* either in respect of the prayer itself, or the things we pray for." It has, however, been thought that the word has crept into the common form of covenants through inadvertence.

without

without any let, &c. of them, or either of them, their or either of their executors, administrators or assigns, *or any other person or persons whomsoever*, it was insisted at the bar that executors can only be understood to covenant against their own acts; and therefore, that the words "any other person or persons whomsoever," must be restrained to persons claiming under them. And it is, perhaps, not too much to say, that the opinion of the Court inclined to this construction (*l*). Wherever, therefore, executors or trustees agree to enter into covenants extending beyond their own acts, the agreement of the parties should be distinctly stated in the recitals.

V. 3. In a case (*m*) where *A* and *B* were joint-tenants for years of a mill, *A* assigned all his interest to *C*, without the assent of *B*, and died. *B* afterwards by indenture reciting the lease, and that it came to him by survivorship, granted the residue of the term to *J. S.* and covenanted for quiet enjoyment of it notwithstanding any act done by him. *B* also gave the purchaser a bond conditional to perform the covenants, *grants*, articles and agreements in the assignment; and the purchaser having been evicted by *C* of the moiety assigned to him, brought an action on the bond, and obtained judgment. Lord Eldon (*n*) seems to consider the judgment as having turned on the recital, and that the recital itself amounted to a warranty. But the ground of the decision appears to be, that the word *grant* in the assignment amounted to a warranty of the title, and was not qualified by the ensuing particular covenant, because the grant was of the whole estate, as appeared from the recital, and was defective from the

(*l*) Noble *v.* King, 1 H. Blackst. 14.

(*m*) Proctor *v.* Johnson, Yelv. 175; Cro. Eliz. 809; Cro. Jac. 233.

(*n*) See 2 Bos. and Pull. 25; and see Seddon *v.* Senate, 13 East, 63; Barton *v.* Fitzgerald, 15 East, 530.

first

first as to a moiety, and the condition of the bond was to perform all grants, &c.

It seems material to refer the case of Johnson *v.* Proctor to the true ground of the decision, because if the case turned solely on the recital, it might perhaps be thought that a general recital in a conveyance of the inheritance of an estate, that the vendor is seised in fee, would amount to a general warranty, and would not be controlled by limited covenants for the title—a proposition which certainly cannot be supported.

4. Where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct.

Thus, in Nervin *v.* Munns (*o*), the vendor covenanted, 1st, that notwithstanding any act by him to the contrary, he was seised in fee: 2dly, that he had good right to convey: 3dly, that the lands were clear of all incumbrances made by him, his father, or grandfather: and 4thly, that the vendee should quietly enjoy the estate against all persons claiming under the vendor, his father, or grandfather. And it was holden by three justices against North, Chief Justice, that the second covenant, although general, was restrained by the first covenant to acts done by the vendor.

So in Browning *v.* Wright (*p*), where a vendor who claimed an estate in fee by purchase, sold the estate, and covenanted first, that notwithstanding any thing by him done to the contrary, he was seised in fee, "and that he had good right, &c. to convey in manner aforesaid," it was holden that the generality of the latter covenant was restrained by the restrictive words in the former. For, in the first place, the purchaser was, according to the general

(*o*) 3 Lev. 46. (*p*) 2 Bos. and Pull. 13.

practice,

practice, entitled to limited covenants only; and, in the next place, the special covenants would be of no use, if the other were general. Besides, the defendant having covenanted that, "for and notwithstanding any thing by him done to the contrary," he was seised in fee, *and that* he had good right to convey; the latter part of the covenant, coupled as it was with the former part by the words "and that," must necessarily be over-ridden by the introductory words "for and notwithstanding any thing by him done to the contrary (*q*)."

Again, where tenant *pur auter vie* leased for twenty-one years, and covenanted that he had not done any *act*, *but* the lessee should or might enjoy it during the years; afterwards, within the twenty-one years, *cestui que vie* died; and it was adjudged that the covenant was not broken, for "but" referred the subsequent words to the preceding words (*r*).

So in Broughton *v.* Conway (*s*), a covenant that the vendor had not done any act to disturb the vendee, *but that* the assignee might enjoy without the disturbance of him *or any other person*, was held to be confined to acts done by the vendor, on the ground of the latter words being only a continuation of and dependent on the preceding matter. In this case, however, one of the judges was decidedly of a contrary opinion; and certainly there were express words to get over, namely, "or any other person;" which circumstance does not occur in any other of this line of cases, in all of which the reader will perceive, that no word was rendered inoperative, but the introductory clause was merely held to extend over all the distinct covenants, in the same manner as a general

(*q*) *Per* Lord Alvanley, 3 Bos. and Pull. 574.

(*r*) Peles *v.* Jervies, Dy. 240, marg.; Cro. Jac. 615, pl. 5.

(*s*) Dy. 240; Mo. 58; and see S. C. cited and applied by Lord Ellenborough, C. J. 8 East, 89; and 1 Brod. and Bing. 340.

introduction

introduction to a will frequently influences the whole will. And in a recent case (*t*), where the covenants were introduced with the usual words, restricting them to the covenantors own acts, but the covenant for quiet enjoyment ended thus: " of or by the said grantors or any of them, &c. *or of or by any other person or persons whatsoever*;" and the covenant against incumbrances was general, excepting only a chief-rent; the Court of King's Bench determined, that the covenant for quiet enjoyment was not restrained by the introductory words of restriction, but was general and unlimited. Lord Ellenborough, C. J. in delivering the opinion of the Court, justly laid great stress on the covenant being a distinct covenant from the covenant for title. He said, that it was perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner, for the particular description of title which he purports to convey, than for quiet enjoyment. He may suspect, or even know, that his title is, in strictness of law, in some degree imperfect, but he may at the same time know, that it has not become so by any act of his own; and he may likewise know, that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it; he may, therefore, very readily take upon him an indemnity against an event which he considers as next to impossible, whilst he chooses to avoid a responsibility for the strict legal perfection of his title to the estate, in case it should be found at any period to have been liable to some exception at the time of his conveyance.

In a later case (*u*), where the subject was elaborately discussed, the covenants in an assignment of a leasehold

(*t*) Howell *v.* Richards, 11 East, 633.

(*u*) Nind *v.* Marshall, 1 Brod. and Bing. 319.

estate

estate were, 1. that notwithstanding any act by the seller, the lease was a good lease; 2. "and further, that" the purchaser might peaceably enjoy without any interruption from "the seller, his executors, administrators or assigns, or any other person or persons whatsoever having or lawfully claiming, or who should or might at any time or times thereafter, during the said term, have or lawfully claim, any estate, &c. in the premises; *and that* free from incumbrances by the seller; and moreover, for further assurance by the seller, his executors and administrators, and all persons claiming by, from, under or in trust for him or them. All the covenants therefore were restricted to the acts of the seller, except the covenant for quiet enjoyment, which in words expressly extended to all mankind. It was held by three judges against one, that by construction the covenant for quiet enjoyment was restrained to persons claiming under the seller, and this case was distinguished from Howell *v.* Richards, on the ground that there the covenant, respecting incumbrances, contained words as general as the words of the preceding covenant for quiet enjoyment, with one single exception, viz. the chief-rent, which was not an act or default of the party, or of any claiming under him: this exception, therefore, confirmed the generality of all the other words.

Perhaps we should in this place notice the case of Barton *v.* Fitzgerald (*v*). It arose upon covenants in an assignment of a lease. The lease was recited to be for the term of ten years, and the seller assigned the estate to the purchaser for the residue of that term. The covenants were, first, the common covenant, that the seller had done no act to incumber, except an under-lease; 2dly, "and also," that the lease was subsisting, and not become void or voidable; 3dly, for quiet enjoyment against the act of

(*v*) 15 East, 530.

the

the seller; and lastly, for further assurance of the seller during the residue of the term. It appeared that the lease was for ten years, if a person should so long live, and he died after the assignment, but before the expiration of the ten years, by effluxion of time. And the Court of King's Bench held, that the second covenant was general and unlimited, and that by the death of the *cestui que vie*, the purchaser had a good right of action. The judges relied principally on the recital. The exception of the under-lease, which was for a term absolute, imported, they thought, that the seller had a right to incumber absolutely for the term stated, and they were of opinion, that all the other covenants would be operative, though the second were construed to be absolute. This case, it will be observed, depended upon very particular circumstances; independently of which it should seem, that the covenant upon which the purchaser recovered would have been restrained by the other covenants.

5. But where the *first* covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent.

Thus in Gainsford *v.* Griffith (*x*), on an assignment of a leasehold estate, the vendor covenanted that the lease was a good, certain, perfect and indefeasible lease in the law, and so should remain during the residue of the term, and that the purchaser, his executors, administrators and assigns, should quietly enjoy the premises without any let, denial, &c. by the vendor, his executors or assigns; and acquitted or otherwise saved harmless of all incumbrances committed by the vendor. And it was holden, that the generality of the preceding covenant was not restrained by the latter covenant.

(*x*) 1 Saund. 58; 1 Sid. 328. See 2 Bos. and Pull. 23. 25; 1 Brod. and Bing. 331.

And

And in Norman *v.* Foster, Lord C. J. Hale said,—If I covenant that I have a lawful right to grant, and that you shall enjoy, notwithstanding any claiming under me; these are two several covenants, and the first is general, and not qualified by the second. And to this Wylde, J. agreed, and he said, that one covenant went to the *title*, and the other to the *possession* (*y*).

So in the late case of Hesse *v.* Stevenson (*z*), where, on an assignment of certain shares of a patent right, the assignor covenanted, that he had good right, &c. to convey the shares, and that he had not by any means directly or indirectly forfeited any right or authority he ever had or might have had over the same, it was decided that the generality of the first covenant was not restrained by the latter covenant. Lord Alvanley said, that the covenant, instead of being framed in the usual and almost daily words, where parties intend to be bound by their own acts only, viz. "for and notwithstanding any act by him done to the contrary," omitted them altogether. The omission of these words was almost of itself decisive. The attention of the purchaser was not called by any words to the intent of the vendor to confine his covenant to his own acts. The Court ought not to indulge parties in leaving out words which are ordinarily introduced, and by which the real meaning of the parties might be plainly understood.

6. And in cases of this nature, as, on the one hand, a subsequent limited covenant does not restrain a preceding general covenant, so, on the other hand, a preceding general covenant will not enlarge a subsequent limited covenant.

Thus, in Trenchard *v.* Hoskins (*a*), a person being seised

(*y*) 1 Mod. 101.

(*z*) 3 Bos. and Pull. 565.

(*a*) Winch, 91; 1 Sid. 328. See 2 Bos. and Pull. 19.

of an estate granted under letters patent, conveyed it to a purchaser, and in the conveyance the grant from the crown was recited, and the title was deduced from the grantee to the vendor, who entered into covenants, first, that he was seised in fee; secondly, that he had good power to convey; and thirdly, that there was no reversion in the crown, *notwithstanding any act done by him.* In grants of lands by the crown, it is usual to reserve a reversion which the grantee cannot bar. After great difference of opinion on the subject, it seems to have been decided, that the restrictive words to the last covenant did not extend to the two preceding ones; the Court presuming the intention to be, that the vendor should enter into an absolute covenant for his seisin in fee, in all cases but one; namely, that he should not be liable on the objection of a reversion existing in the crown, unless that reversion appeared to have been vested in the crown by his own act (*b*).

7. Where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others, although they all relate to the same land (*c*).

Thus, where *A* covenanted that he was seised in fee notwithstanding any act done by him, and that the lands were of a certain annual value; the latter was holden to be an absolute covenant, that the lands were of the stated value (*d*).

So in another case (*e*), where a man covenanted that he was seised in fee, notwithstanding any act done by him or any of his ancestors; and that no reversion was in the king or any other; and that the estate was of a

(*b*) See 2 Bos. and Pull. 25, *per* Lord Eldon.

(*c*) See 3 Lev. 47.

(*d*) Hughes *v.* Bennett, Cro. Car. 495; 1 Jones, 403. S. C.

(*e*) Crayford *v.* Crayford, Cro. Car. 106.

certain

certain annual value; and that the plaintiff and his heirs should enjoy the estate discharged from all incumbrances made by him or any of his ancestors, it was decided, that the covenant as to value was an absolute and distinct covenant, and had no dependence upon the first part of the covenant.

8. In the case of Rich *v.* Rich (*f*), a covenant "that lands were of the value of 1,000 *l. per annum*, and so should continue, notwithstanding any act done or to be done by the covenantor," was holden to be only a covenant, that the covenantor had not lessened the value.

9. This subject must not be closed without observing, that if general covenants are entered into contrary to the intention of the parties, equity will, on sufficient proof, correct the mistake in the same manner as errors are corrected in marriage articles, and will relieve against any proceedings at law upon the covenants, as they originally stood (*g*).

III. 1. It still remains to say a few words concerning a purchaser's remedy under covenants for the title; and first, if he be evicted, and the eviction is within the covenant, he may bring an action at law for damages.

2. But, as we have already seen, unless the eviction be within the covenant, or there was a fraudulent concealment of the defect, a purchaser cannot recover the purchase money, in case of eviction, either at law or in equity (*h*).

3. If the title prove bad, a purchaser may have recourse to law for damages, or *if the defect can be supplied by the*

(*f*) Cro. Eliz. 43.

(*g*) Coldcott *v.* Hill, 1 Cha. Ca. 15; 1 Sid. 328, cited; Fielder *v.* Studly, Finch, 90. See 2 Bos. and Pull. 26; 3 Bos. and Pull. 575; and *supra*, p. 143.

(*h*) *Supra*, p. 470.

vendor, he may file a bill in equity for a specific performance of the covenant for further assurance. And a vendor who has sold a bad title, will, under a covenant for further assurance, be compellable to convey any title which he may have acquired since the conveyance, although he actually purchased such title for a valuable consideration (*i*).

4. It seems that, under a covenant for further assurance, a purchaser may require a duplicate of the conveyance to be executed to him, in case he is compelled to part with the original to a purchaser from him of part of the estate (*k*).

5. So if the vendor become bankrupt, the purchaser may call upon his assignees to execute further assurances, although the vendor was only tenant in tail, and did not suffer a recovery (*l*).

6. But if the original contract was not fit to be executed, by equity, the Court will not interfere in behalf of the purchaser, but leave him to his remedy at law (*m*). And if the title prove bad, and the purchase was made at a great undervalue, equity will relieve the vendor against an action on the covenants for title, allowing the purchaser his purchase money, with interest only, he discounting the mesne profits (*n*).

7. An action for breach of a covenant for title (*o*) will not be barred by the bankruptcy and certificate of the covenantor, although the cause of action accrued before the bankruptcy.

(*i*) Taylor *v.* Debar, 1 Cha. Ca. 274; 2 Cha. Ca. 212. See Seabourne *v.* Powell, 2 Vern. 11.

(*k*) Napper *v.* Lord Allington, 1 Eq. Ca. Abr. 166, pl. 4.

(*l*) Pye *v.* Daubuz, 3 Bro. C. C. 595.

(*m*) Johnson *v.* Nott, 1 Vern. 271.

(*n*) Zouch *v.* Swaine, 1 Vern. 320.

(*o*) Hammond *v.* Toulmin, 7 Term Rep. 612; Mills *v.* Auriol, 1 Hen. Blackst. 433.

Lastly,

Lastly, it has been lately determined by the Court of King's Bench, that an action of covenant does not lie against a devisee upon the statute of fraudulent devises (*p*). No such remedy lies at common law, and therefore, although a vendor die seised of real estates, yet if they are devised by his will, a purchaser will not have any remedy against them, notwithstanding that the covenants for title are broken, and there is no other fund to which he can resort for damages. This construction of the act must, in many instances, prove highly injurious to purchasers, for certainly this point has never been adverted to in practice (I). A purchaser may, however, guard against the effect of a devise of the vendor's real estates, by taking a bond conditioned to be void if the vendor is seised in fee, and has good right to convey, &c. The penalty would be a *debt* recoverable under the statute. Such a bond is however scarcely ever taken at the present day.

(*p*) 3 W. and M. c. 14; Wilson v. Knubley, 7 East, 128.

(I) The author in the sessions of 1818 prepared a bill to remedy this defect in the statute of fraudulent devises, which passed the House of Commons, but was not read a second time in the House of Lords.

CHAPTER XIV.

OF THE PERSONS INCAPABLE OF PURCHASING.

UNDER this head we may consider, 1st, Who are incapable of purchasing absolutely for their own benefit by the general rules of law: and, 2dly, Who are incapable of purchasing particular property, except under particular restraints, on account of the rules of equity.

SECTION I.

Of Persons incapable of Purchasing by the general Rules of Law.

THIS incapacity is of three kinds: 1st, An absolute incapacity: 2dly, An incapacity to hold, although an ability to purchase: and, 3dly, An incapacity to purchase, except *sub modo*.

I. First then, With respect to persons who are altogether incapable of purchasing.

The parishioners, or inhabitants of any place, or the churchwardens, are incapable of purchasing lands (*a*) by those names.

But it seems that in London, the parson and churchwardens are a corporation to purchase lands (*b*). And

(*a*) Co. Litt. 3, a.

(*b*) Warner's case, Cro. Jac. 532; Hargrave's n. (4) to Co. Litt. 3, a.

churchwardens

churchwardens and overseers are enabled, by statute law (*c*), to purchase a workhouse for the poor, but this is merely as trustees, and does not affect the general rule of law.

II. With respect to persons who are capable of purchasing, but incapable of holding: They are,

1st, Aliens: for although they may purchase, yet it can only be for the benefit of the king; and upon an office found, the king shall have it by his prerogative (*d*). And it seems that an alien cannot protect himself by taking the conveyance in the name of a trustee, for the mischief is the same as if he had purchased the lands himself (*e*).

But if an alien be made a denizen by the king's letters patent, he is then capable of holding lands (*f*) purchased after his denization.

And it seems, that if an alien purchase lands, and before office found the king make him a denizen by letters patent, and confirm his estate, the confirmation will be good; as the land is not in the king till office found (*g*).

2dly, Persons who have committed felony or treason, or have been guilty of the offence of *præmunire*, and afterwards purchase lands, and then are attainted; for they have ability to purchase, although not to hold; and for that reason the lord of the fee shall have the lands; but if they purchase after they are attainted, they are then in the same situation with aliens, and the lands must go to the king (*h*).

(*c*) 9 Geo. I. c. 7, s. 4.

(*d*) Co. Litt. 2, b.

(*e*) The King *v.* Holland, All. 14; Sty. 20. 40. 75. 84. 90. 94; 1 Ro. Abr. 194, pl. 8.

(*f*) Co. Litt. 2, b.

(*g*) Goulds. 29, pl. 4.

(*h*) Co. Litt. 2, b. See Rex *v.* Inhab. of Haddenham, 15 East, 468.

themselves, it should seem, wave the purchase (*p*): and if they recover and agree thereunto, their heirs cannot set it aside.

If they die during their lunacy or idiotcy, then their heirs may avoid the purchase (*q*). And as the king has the custody of idiots, upon an office found he may annul the purchase (*r*): and after the lunatic is found so by inquisition, his committee may vacate the purchase (*s*).

Lastly, under this head we may, perhaps, rank papists and persons professing the popish religion (*t*), who have neglected to take the oath prescribed by the 31 Geo. III. c. 32 (*u*). For a papist takes for the benefit of his protestant next of kin till his conformity; for the benefit of himself after his conformity; and for the benefit of his heir after his death—Nay, for the benefit of himself, during his life and non-conformity, by reason of the action which is given him; and may therefore be said to be capable of purchasing *sub modo* (*x*).

SECTION II.

Of Purchases by Trustees, Agents, &c.

We come now to persons who are incapable of purchasing particular property, except under particular restraints, on account of the rules of equity.

I. It may be laid down as a general proposition, that

(*p*) On this point see 2 Blackst. Comm. 291, 7th edit.

(*q*) Co. Litt. 2, b.

(*r*) Co. Litt. 247, a.

(*s*) Clerk by Committee *v.* Clerk, 2 Vern. 412; Addison by Committee *v.* Dawson, 2 Vern. 678; Ridler *v.* Ridler, 1 Eq. Ca. Abr. 279.

(*t*) See 11 and 12 W. III. c. 4; Michaux *v.* Grove, 2 Atk. 210.

(*u*) See 43 Geo. III. c. 30.

(*x*) See Mallom *v.* Bringloe, Willes, 75; Com. 570, S. C.

trustees

trustees (*y*), unless they are nominally so, as trustees to preserve contingent remainders (*z*), agents (*a*), commissioners of bankrupts (*b*), assignees of bankrupts (*c*) (I),

(*y*) Fox *v.* Mackreth, 2 Bro. C. C. 400; 4 Bro. P. C. by Tomlins, 258; Hall *v.* Noyes, 3 Bro. C. C. 483; and see 3 Ves jun. 748; Kellick *v.* Flexny, 4 Bro. C. C. 161; Whichcote *v.* Lawrence, 3 Ves. jun. 740; Campbell *v.* Walker, 5 Ves. jun. 678; and Whitackre *v.* Whitackre, Sel. Cha. Ca. 13.

(*z*) See Parks *v.* White, 11 Ves. jun. 226.

(*a*) York-Buildings Company *v.* Mackenzie, 8 Bro. P. C. 42; Lowther *v.* Lowther, 13 Ves. jun. 95. See Watt *v.* Grove, 2 Scho. and Lef. 492; Whitcomb *v.* Minchin, 5 Madd. 91; Woodhouse *v.* Meredith, 1 Jac. and Walk. 204, now on appeal before the L. C.

(*b*) *Ex parte* Bennet, 10 Ves. jun. 381; *ex parte* Dumbell, Aug. 13, 1806; Mont. notes, 33, cited; *ex parte* Harrison, 1 Buck, 17.

(*c*) *Ex parte* Reynolds, 5 Ves. jun. 707; *ex parte* Lacey, 6 Ves. jun. 625; *ex parte* Bage, 4 Madd. 459.

(I) Lord Eldon has said, that the rule is to be more peculiarly applied with unrelenting jealousy in the case of an assignee of a bankrupt; adding, that it must be understood, that, whenever assignees purchase, they must expect an inquiry into the circumstances. See 6 Ves. jun. 630, n. (b); and 8 Ves. jun. 346; 10 Ves. jun. 395. And an assignee purchasing the estate himself, or permitting his co-assignee to purchase it, will be a sufficient cause of removal. *Ex parte* Reynolds, 5 Ves. jun. 707.

If an assignee purchase an estate sold under the commission, and upon an accidental increase in the value of the property, he afterwards sells it at a considerable advance, he cannot, upon discovering that he ought not to have been a purchaser, pay the difference of the sales to the general fund of the creditors. *Ex parte* Morgan, Feb. 24, 1806; Mont. notes, 31. And where upon the sale of a bankrupt's estate by auction, in two lots, both of the lots were bought in by the assignee, without the consent of the creditors, the Lord Chancellor, although there was a profit on the resale of one lot, which was more than equal to the loss on the resale of the other, so that the balance was in favour of the estate, held the assignee liable to make good the loss on the lot which was resold at a less sum, without permitting him to set off the profit gained by the resale of the other lot. *Ex parte* Lewis, 1 Glyn and Jame. 69.

solicitors

solicitors to the commission (*d*), auctioneers, creditors who have been consulted as to the mode of sale (*e*), or any persons who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property themselves; except under the restrictions which will shortly be mentioned. For if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest* (I)

The able counsel for the appellants in York-Buildings Company *v.* Mackenzie (*f*), strongly observed, that the ground on which the disability or disqualification rests, is no other than that principle which dictates, that a person cannot be both judge and party. No man can serve two masters. He that is intrusted with the interest of others cannot be allowed to make the business an object of interest to himself; because, from the frailty of nature, one who has the power will be too readily seized with the

(*d*) Owen *v.* Foulkes, 6 Ves. jun. 630, n. (b); *ex parte* Limwood; *ex parte* Churchill, 8 Ves. jun. 343, cited; *ex parte* Bennet, 10 Ves. jun. 381; *ex parte* Dumbell, Aug. 13, 1806; Mont. notes, 33, cited. See 12 Ves. jun. 372; 3 Mer. 200.

(*e*) See *ex parte* Hughes, 6 Ves. jun. 617; Coles *v.* Trecothick, 9 Ves. jun. 234; 1 Smith's Rep. 233.

(*f*) 8 Bro. P. C. 63, where the authorities in the civil law are collected.

(I) This principle has been attended to in the general inclosure act, which renders commissioners incapable of purchasing any estate in the parish in which the lands are intended to be inclosed, either in the names of themselves or others, until five years after the date and execution of the award, 41 Geo. III. c. 109, s. 2.

inclination

inclination to use the opportunity for serving his own interest at the expense of those for whom he is intrusted.

But the rule has never been applied to a purchase by a mortgagee from the mortgagor, and it is to be hoped that it never will. In Ireland, many leases granted by mortgagors to mortgagees were set aside by Lord Redesdale, on the ground that the transaction was usurious, although that learned judge's successors have not been inclined to carry the principle as far as he did. In one case (*g*) it was objected that the decision might tend to impeach dealings between mortgagor and mortgagee for a sale of the equity of redemption. But Lord Redesdale said, that to this a good answer was given at the bar. The cases are totally different, the parties stand in a different relation: if there be two persons ready to purchase, the mortgagee and another, the mortgagor stands equally between them; and if the mortgagee should refuse to convey to another purchaser, the mortgagor can compel him, by applying the purchase money to pay off the mortgage. It can therefore only be for want of a better purchaser, that the mortgagor can be compelled to sell to the mortgagee: *but courts view transactions, even of that sort between mortgagor and mortgagee, with considerable jealousy, and will set aside sales of the equity of redemption, where, by the influence of his incumbrance, the mortgagee has purchased for less than others would have given, and there were circumstances of misconduct in his obtaining the purchase.*

Perhaps the observation, that "Courts view transactions, even of that sort between mortgagor and mortgagee, with considerable jealousy," puts the doctrine higher than one should wish to see it stand. A sale by a mortgagor to a mortgagee stands on the same principle as a sale between parties

(*g*) Webb *v.* Rorke, 2 Scho. Beatty, 164; *ex parte* Marsh, 1 and Lef. 673; and see 1 Ball and Madd. 148.

parties having no connection with each other, and can only be impeached on the ground of fraud: the mere circumstance that the mortgagee purchased for less than another would have given, would not of itself be a sufficient ground to impeach a sale, and Lord Redesdale, in stating that as an ingredient, adds also, circumstances of misconduct in obtaining the purchase. Where a mortgagee sells under the general order in bankruptcy, it is usual to apply for leave for him to bid at the sale, where he intends to do so. But there he may fairly be considered as the seller, and he cannot, without the leave of the Court, sustain the two characters of seller and buyer (*h*). But if a mortgagee take a conveyance with a power of sale, he is a trustee for sale, and as such disabled from purchasing (*i*).

The principle has, however, been extended to a purchase by an attorney from his client, while the relation subsists (*j*).

So a person chosen as an arbitrator, cannot buy up the unascertained claims of any of the parties to the reference: it would corrupt the fountain, and contaminate the award (*k*).

Where a person cannot purchase the estate himself, he cannot buy it as agent for another (*l*), and perhaps cannot even employ a third person to contract or bid for the estate on the behalf of a stranger (*m*).

This general rule stands much more upon general

(*h*) *Ex parte* Du Cane, 1 Buck, 18. See *ex parte* Marsh, 1 Madd. 148.

(*i*) Downes *v.* Glazebrook, 3 Mer. 200.

(*j*) See Bellew *v.* Russell, 1 Ball and Beatty, 96; 9 Ves. jun. 296; 13 Ves. jun. 138, as to *gifts*, which cite the early cases.

(*k*) Blennerhasset *v.* Day, 2 Ball and Beatty, 116; Cane *v.* Lord Allen, 2 Dow. 289.

(*l*) See 9 Ves. jun. 248; *ex parte* Bennet, 10 Ves. jun. 381.

(*m*) See *ex parte* Bennet, *ubi sup. sed qu.*

principle,

principle, than upon the particular circumstances of any individual case. It rests upon this, that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases (*n*).

The necessity of such a general rule is evinced by an instance mentioned by Lord Eldon, of a solicitor under a commission, who finding he could make a bargain to sell the estate for 1,400 *l.* kept that in his own breast, and made a bargain with the assignees for the purchase of it at 350 *l.* (*o*).

In Davidson *v.* Gardner (*p*), Lord Hardwicke laid down the following rules as to a trustee purchasing of his *cestui que trust*. 1st, That in all cases of a trustee purchasing of the *cestui que trust*, the Court will look upon it with a jealous eye. 2dly, It has been laid down as a general rule, that where a trustee for persons not *sui juris*, as infants and *femes covert*, becomes both buyer and seller, the Court will under no circumstances whatever, be they never so fair between the parties (as consulting the friends of the infant, or of their refusing to purchase, or the like), establish a purchase of that kind; unless the transaction is legitimated by the act of the Court, or some public act. And the reason is, because if such purchases were allowed, they would be liable to very great abuses; and this is the reason why the Court will not allow a trustee any thing for his trouble. So, where a trustee renewed a lease in his own name, though it was proved that all the friends of the infant were consulted, and they refused to renew it, the Court decreed it to be in trust for the infant, though not the least unfairness

(*n*) See 8 Ves. jun. 345, *per* Lord Eldon.

(*o*) See 8 Ves. jun. 349.

(*p*) Chancery, 21st July 1743, MS. See Prestage *v.* Langford, *infra*; Lambert *v.* Bainton, 1 Ch. Ca. 199.

fairness appeared; which was the case of Rumford Market, before Lord King (*q*). But if a bill is brought, and a sale ordered, and notice of the sale before the Master, and the trustee purchases, the Court has refused to set such sale aside, all the other circumstances being fair. So where there was a public sale of an estate by proclamation in the country; which was the case of Saunders *v.* Burroughs, before the present Master of the Rolls; but if that had been a private sale, though the consent of all the relations was had, and no unfairness appeared, I think such a sale should be set aside, at least not carried into exetion. But it might be inconvenient to extend the rule so far as to prevent a trustee from purchasing of one who was *sui juris*, where no unfairness appeared. And in the principal case, which was of a mixed kind, the defendant who had purchased being a trustee for the plaintiff, who was a *feme covert*, and had the estate to her separate use, and therefore in a court of equity considered as a *feme sole*, and *sui juris*, as to the disposal of her estate; Lord Hardwicke dismissed the bill, which was brought to set aside the assignment she had made of her interest in a brewhouse to the defendant; it appearing that she had received a full value, and no particular instances of fraud being proved.

From this case it appears that, in the time of Lord Hardwicke, a purchase by a trustee, even for infants, was deemed good, if the estate was sold by public auction, or before a Master; but a purchase by a trustee, whether for adults or infants, cannot now be supported, although the estate be sold by public auction (*r*), or before a Master,

(*q*) Keech *v.* Sandford, Sel. Cha. Ca. 61. See Lesley's case, 2 Freem. 52.

(*r*) York-Buildings Company *v.* Mackenzie, 8 Bro. P. C. 42; Whichcote *v.* Lawrence, 3 Ves. jun. 740; Campbell *v.* Walker, 5 Ves. jun. 678; Sanderson *v.* Walker, 13 Ves. jun. 601, S. C.; and *ex parte* James, 8 Ves. jun. 337; and see 10 Ves. jun. 393; Attorney Gen. *v.* Lord Dudley, Coop. 146.

under a decree for sale (*s*). Nor, indeed, ought the publicness of the sale to sustain a purchase, which cannot otherwise be supported. For the trustee may know not only the surface value, but that there are minerals, in which case he would buy upon the rent, and gain all that advantage (*t*). So there may be a great many clandestine dealings, which may bring it to a price far short of that which would be produced if full information was given (*u*).

But under particular circumstances, a purchase by a trustee or agent, before the Master, may be confirmed, although with great reluctance.

Thus, in Wren *v.* Kerton (*x*), the facts were these: Upon a former sale before the Master, the sum of 23,000 *l.* was bid by a person bidding *bonâ fide*. That sale was defeated by setting up a fictitious bidder. Afterwards the lot was again put up three times. On the two first occasions no more was offered than 12,000 *l.* and 6,000 *l.* At the last sale one Wilson was declared the purchaser at the sum of 15,000 *l.* He purchased as trustee for Wade, the agent and manager of the colliery.

The Lord Chancellor said, if this had been an original sale, and the agent had purchased in the name of another person, very slight circumstances would have induced him, even at some risk, to set that aside; as it was the duty of Wade, if he meant to bid, to furnish all the knowledge he had to those who were to sell. The difficulty that pressed him was, the consequence, the danger of further loss by resale. He would (he added) not hesitate to open the sale if the least advance upon 15,000 *l.* was offered; but without such an offer there was nothing leading him to suppose it would ever again reach the sum that was originally bid.—The Master's report of the best bidder was

(*s*) Price *v.* Byrn, 5 Ves. jun. 681, cited. See Cary *v.* Cary, 2 Scho. and Lef. 173.

(*t*) See 10 Ves. jun. 394.

(*u*) See 8 Ves. jun. 349.

(*x*) 8 Ves. jun. 502.

was, with considerable reluctance, confirmed; unless, on or before the first seal, an application should be made to open the biddings, giving security to answer the difference between the produce of the resale and the sum of 15,000*l.* No security was however offered, and the agent completed the purchase.

In Oldin *v.* Samborne (*y*), Lord Hardwicke said, that it was improper for a guardian to purchase his ward's estate immediately on his coming of age; but though it has a suspicious look, yet if he paid the full consideration, it is not voluntary, nor can it be set aside. But it seems clear, that such a purchase would now be set aside on general principles, without reference to the adequacy of the consideration (*z*).

It appears, however, that unless fraud can be proved, the circumstance of the purchaser being related to the trustee, agent or other person having a confidential character, cannot even be opposed as a bar to the *aid* of the Court *in favour of the purchaser.*

Thus, in Prestage *v.* Langford (*a*), the auctioneer's son, who was in partnership with his father, and another person, bought an estate sold by order of a trustee for infant legatees, and contracted to sell it a few days afterwards for 750*l.* more than they gave for it. But the proof of fraud being judged defective, the Court would not set aside the sale merely because one of the auctioneers was buyer and seller too, but decreed a specific performance, nevertheless, without costs; *in order* (as was said) *to discourage all such suspicious transactions.*

So, in the late case of Coles *v.* Trecothick (*b*), the trustee's father (for whom the trustee in this instance acted as

(*y*) 2 Atk. 15.

(*z*) See Dawson *v.* Massey, 1 Ball and Beatty, 219.

(*a*) 3 Wood, 248, n. Chan. M. 11 Geo. III.

(*b*) 9 Ves. jun. 234; 1 Smith, 233.

agent), purchased an estate (which had been previously put up to sale by auction, and bought in) of the *cestui que trust* for 20,000 *l.*; and as the *cestui que trust* had full knowledge of the value, &c. and he himself, and not the trustee, fixed the price, and consented to the sale, and no fraud was proved, a performance *in specie* was decreed; although the *cestui que trust* had since the contract been offered 5,000 *l.* more for the estate.

It must, however, be observed, that the case of Prestage *v.* Langford was decided before the broad rule which now prevails was laid down. Indeed that case is clearly overruled by later decisions, as the purchaser was in fact employed in the sale. And the decision in the case of Coles *v.* Trecothick, does not seem to meet with the approbation of the profession. But if, under the particular circumstances of this case, the Court had not compelled execution of the contract, it would certainly have been deciding that neither a trustee himself, nor any one connected with him, or related to him, can buy of the *cestui que trust*, however fair and open the circumstances may be. Indeed, Lord Eldon seems to have founded his decision on the ground, that the trustee himself might have purchased the estate.

It may here be remarked, that where a power is given by a settlement to trustees to sell the estate with the consent of the tenant for life, or to the tenant for life to sell with the consent of the trustees, it is in practice considered, that the estate may be safely purchased by the tenant for life himself. Lord Eldon, although fully aware of the danger attending a purchase of the inheritance by a tenant for life, seems to think that it cannot be impeached on general principles (*c*). A few years ago, considerable doubt was entertained by the profession, whether the power of

(*c*) See 9 Ves. jun. 52; and 11 Ves. jun. 480; but see *ib.* 476, 477.

sale

sale and exchange, usually inserted in settlements of estates, authorized a sale or exchange to or with the tenant for life, or at least whether equity would not relieve against the transaction, and that doubt was stated as a ground for requiring the aid of parliament, in a petition for an act to enable an exchange of settled estates with the tenant for life; which it was conceived could not be done under a power of sale and exchange in the settlement. The Chief Baron, and Mr. Baron Hotham, to whom the bill was referred, reported, and submitted it as their opinion, that the doubt which was the cause of petitioning for the bill was not well founded; and therefore the bill was unnecessary, *and that the passing of such a bill might cause a great prejudice to numerous titles under executions of powers of sale and exchange of a similar kind:* and the House of Lords accordingly rejected the bill; in consequence of which many estates of great value have been purchased, and taken in exchange by tenants for life, under the usual powers of sale and exchange. Since these observations were written, the point has again been agitated in practice. It is a point which no private opinion can put at rest, although, after the opinions of the Chief Baron, and Mr. Baron Hotham, sanctioned by the House of Lords, and followed up in practice, there seems to be no ground to fear that a different rule will be established.

II. The purposes for which estates are vested in trustees for sale, are generally, either for the benefit of creditors; of individuals *sui juris*; or persons not *sui juris*; and we are now to consider in what manner trustees may become purchasers of estates vested in them for those several purposes, without being liable to be called to account for so doing.

Of purchases by trustees or other prohibited persons in general, it must previously be remarked, that the Court will

not permit them to give up their offi
would lead to infinite mischief. T
themselves, as we shall see, can decic
can say *ab ante* they will permit it: t
exist at the time of the second sale t
know (*d*).

1. With respect to a trustee for
the estate himself.

In Whelpdale *v.* Cookson (*e*), whe
tors purchased part of the estate him
said, if the *majority* of the creditors
should not be afraid of making the p

But in a late case (*f*), Lord Eldo
authority of that case; for if the trus
the creditors, he is a trustee for the
selling to others; and if the jealous
from the difficulty of the *cestui que*
himself what is most or least for h
considerable doubt whether the m
article bind the minority.

It seems doubtful, therefore, whe
be supported unless *all* the credit
convenience, and the general rule
body of persons, are strongly in fa
wicke's opinion.

2. With respect to a trustee for
coming the purchaser of the estate.

If a trustee even for a person *sui*
name of another person, the sale wi
very circumstance carries fraud on t

(*d*) *Ex parte* James, 8 Ves. jun. 352.
(*e*) 1 Ves. 9; 5 Ves. jun. 682, n.
(*f*) See 6 Ves. jun. 628. See *ex parte* (*g*) I 4 Ves. j and see

But it must not be understood, that a trustee cannot buy from his *cestui que trust*; the rule is, that he cannot buy from himself (*h*). If, therefore, the *cestui que trust* clearly discharges the trustee from the trust, and considers him as an indifferent person, there is no rule which says, that he may not purchase of him, although the Court will look with a very jealous eye on a transaction of that nature (*i*): and to be supported, it must clearly appear, that the purchaser, at the time of the purchase, had shaken off his confidential character, by the consent of the *cestui que trust* freely given, after full information, and bargained for the right to purchase (*k*).

So an attorney is not *incapable* of contracting with his client, but the relation must be in some way dissolved, or, if not, the parties must be put so much at arm's length, that they agree to take the character of purchaser and vendor; and you must examine whether all the duties of those characters have been performed. If an attorney deal with his client, he should require him to get another attorney to advise with him as to the value, or, if he will not, then out of that state of circumstances, this clear duty results from the rule of equity, and throws upon him the whole *onus* of the case; that if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest, that he had given his client all that reasonable advice against himself that he would have given him against a third person (*l*). So if an attorney be employed as agent in the management of a landed estate, he cannot deal with his principal for that estate

(*h*) 10 Ves. jun. 246; and see Ayliffe v. Murray, 2 Atk. 58; Crowe v. Ballard, 3 Bro. C. C. 117; 1 Ves. jun. 215.

(*i*) See 6 Ves. jun. 627.

(*k*) See 8 Ves. jun. 353.

(*l*) Gibson v. Jeyes, 6 Ves. jun. 266; see p. 277, 278, *per* Lord Eldon, C.; Wood v. Downes, 18 Ves. jun. 120; Montesquieu v. Sandys, *ibid.* 302.

without honestly communicating to the principal all the knowledge respecting its value which he had acquired as his agent, and unless he do this, the contract, if questioned, cannot be supported (*m*).

And the same circumstances that will authorize a trustee to contract for himself, will enable him to purchase as the agent of another (*n*).

3. With respect to a trustee for a person not *sui juris* buying the estate himself.

The only mode by which this can be effected, so as to protect the purchaser, is, if he sees that it is absolutely necessary the estate should be sold, and he is ready to give more than any one else, that a bill should be filed, and he should apply to the Court by motion to let him be the purchaser. This is the only way he can protect himself; and Lord Alvanley said, there are cases in which the Court would permit it; as if only 500*l.* was offered, and the trustee will give 1,000*l.* (*o*).

III. It remains to consider what remedy the *cestui que trust* has, where his trustee has purchased the trust estate in a manner not authorized by the rules of the Court. It may be premised, that this remedy goes precisely to the same persons as were entitled to the estate before the sale. Therefore, a man having a legal or equitable mortgage on the estate, which was not satisfied by the money produced by the sale, may pursue the remedy afforded by equity against the trustee. And the circumstance of the mortgagee having been present at the sale, where he bid for the estate, is no objection to his claim against the owner of

(*m*) Cane *v.* Lord Allen, 2 Dow. 289, *per* Lord Eldon, C.

(*n*) See 9 Ves. jun. 248.

(*o*) Campbell *v.* Walker, 5 Ves. jun. 678; 13 Ves. jun. 601; see 1 Ball and Beatty, 416.

the

the estate, where he (the owner) has himself set aside the sale and derived any advantage from it (*p*).

If the trustee has not sold the estate, the *cestui que trust* may insist on the purchase being avoided, and may reclaim his estate (*q*); for it need not be shown that the trustee has made an advantage (*r*).

If the *cestui que trust* require a reconveyance of the estate, he must repay to the trustee the original price of the estate, and also all sums laid out for permanent benefit and improvement of the estate, and interest thereon from the times they were actually disbursed; and, on the other hand, the trustee must pay and allow all the rents received by him, and the yearly value of such parts as have been in his own occupation, and all sums received by the sale of timber or other parts of the inheritance, and interest thereon, from the times of their being received. This was decided in the great case of York-Buildings Company *v.* Mackenzie, in the House of Lords (*s*); and it appears that the House allowed him the value of improvements of all kinds, even in the instance of a mansion-house erected, and plantations of shrubs, &c. (*t*).

And where the *cestui que trust* is not desirous to take back the estate, he may require it to be put up to sale again at the price at which it was bought by the trustee: and that if any one bid more, the trustee shall not have the estate; but if not, that he may be compelled to keep it (*u*).

(*p*) *Ex parte* Lacey, 6 Ves. jun. 625; 12 Ves. jun. 8; *ex parte* Morgan, 12 Ves. jun. 6.

(*q*) See 6 Ves. jun. 627; York B. C. *v.* Mackenzie, 8 Bro. P. C. 42; Lord Hardwicke *v.* Vernon, 4 Ves. jun. 411; Randall *v.* Errington, 10 Ves. jun. 423.

(*r*) See 8 Ves. jun. 348; 10 Ves. jun. 385. 393.

(*s*) 8 Bro. P. C. 42.

(*t*) See 6 Ves. jun. 624. This must have been decided in some of the subsequent appeals; see 8 Bro. P. C. 71, note.

(*u*) *Ex parte* Reynolds, 5 Ves. jun. 707; *ex parte* Hughes, *ex parte* Lacey, and Lister *v.* Lister, 6 Ves. jun. 617. 625. 631.

only desirous that the money gained by the trustee on the resale should be paid to him.

Owing to this circumstance, a purchaser of a trust estate from a trustee who had previously sold to himself, is seldom implicated in the suit; but it seems clear, that a person purchasing with notice of the previous transaction would be liable to the same equity as the trustee was subject to. In the late case of Randall *v.* Errington (*c*), a purchaser from a trustee who had purchased in the name of a trustee was made a defendant, and the prayer of the bill was, that if he purchased without notice, the trustee might account for the money gained by the resale; but as the equity against the purchaser was not noticed either by the counsel or the Court, it must be presumed that no notice was proved. A different rule would, to use the expression of a great man, blow up like gunpowder this branch of equitable jurisdiction. It is indeed true, that in the case in the House of Lords, the proceedings in the Court of Sessions were reversed without prejudice to the titles and interests of the lessees and others who might have contracted with the defendant *bonâ fide*, and before the dependence of the process (I).

But this may be satisfactorily accounted for on two grounds; the one, that no notice was charged on the lessees, nor were the leases attempted to be impeached; the other, that the relief sought had been delayed for many years, and the point established by the House of Lords was, to say the least, a new doctrine with reference to Scotland. But this equity is now well established.

(*c*) 10 Ves. jun. 423.

(I) And see the same rule as to under-leases of a charity estate, where the original lease is set aside as improvident. Attorney General *v.* Griffith, 13 Ves. jun. 565; Attorney General *v.* Backhouse, 17 Ves. jun. 283.

No

A purchase by a trustee from his *cestui que trust* is merely *malum prohibitum*, and not *malum in se*. It is one of those contracts which admit of confirmation by the injured party. But to give effect to a confirmation in a case like this, the party confirming must not be under the control of the person whose title is to be confirmed, and he must have a full knowledge of all the circumstances, and of his power to set aside the former transaction (*h*).

(*h*) Morse *v.* Royal, 12 Ves. jun. 355; Murray *v.* Palmer, 2 Scho. and Lef. 474; Roche *v.* O'Brien, 1 Ball and Beatty, 330; Wood *v.* Downes, 18 Ves. jun. 120; Dunbar *v.* Tredennick, 2 Ball and Beatty, 304. *Vide supra*, p. 238.

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If, however, the *cestui que trust* be desirous to have the estate put up in lots, and it was bought by the trustee in one lot, he must either repay the trustee the purchase money with such interest as he would have been liable to pay upon his bargain, he accounting for the rents received, or paying an occupation rent for the estate, if he personally occupied it: or the *cestui que trust* must consent to have the estate put up in one lot, on the terms beforementioned (*x*).

The trustee will, in case of a resale, be allowed any money *bonâ fide* laid out, not only in substantial repairs and improvements, but also in such as have a tendency to bring the estate to a better sale; which will be added to the amount of the purchase money, and the estate will be put up at the aggregate sum; deducting, however, an allowance for acts that deteriorate the value of the estate (*y*).

But no allowance will be made him for any loss he may sustain by a fall in the funds (*z*).

Formerly where a purchase by a trustee was set aside, the rule was, to put up the estate again to be sold to the best bidder; the trustee accounting for the profits, and being allowed his principal money and interest at 4 *per cent.* (*a*).

If the trustee has actually sold the estate, the *cestui que trust* may compel the trustee to pay him what he may have received above the original purchase money (*b*).

Where a trustee buys the trust estate at a fair price, the sale is seldom called in question, unless he afterwards sell it to advantage; and then the *cestui que trust* is of course

(*x*) *Ex parte* James, 8 Ves. jun. 337.

(*y*) *Ex parte* Hughes, 6 Ves. jun. 617; *ex parte* Bennet, 10 Ves. jun. 381.

(*z*) *Ex parte* James, *ubi sup.*

(*a*) See Whelpdale v. Cookson, 1 Ves. 9; 5 Ves. jun. 682, n.

(*b*) Fox v. Mackreth, 2 Bro. C. C. 400; *ex parte* Reynolds, 5 Ves. jun. 707.

only

A purchase by a trustee from his *cestui que trust* is merely *malum prohibitum*, and not *malum in se*. It is one of those contracts which admit of confirmation by the injured party. But to give effect to a confirmation in a case like this, the party confirming must not be under the control of the person whose title is to be confirmed, and he must have a full knowledge of all the circumstances, and of his power to set aside the former transaction (*h*).

(*h*) Morse *v.* Royal, 12 Ves. jun. 355; Murray *v.* Palmer, 2 Scho. and Lef. 474; Roche *v.* O'Brien, 1 Ball and Beatty, 330; Wood *v.* Downes, 18 Ves. jun. 120; Dunbar *v.* Tredennick, 2 Ball and Beatty, 304. *Vide supra*, p. 238.

No person, therefore, can be advised to become the purchaser of an estate so circumstanced, unless the *cestui que trust* will join; nor would a court of equity, on any other terms, enforce a specific performance of such a contract. But this doctrine cannot be extended to the mere case of a purchase by a trustee in his own name, from his *cestui que trust*, which may or may not be binding according to circumstances, unless the purchaser have also notice that the sale was not such as could be supported in equity.

Before closing this chapter it must be remarked, that if a *cestui que trust* acquiesce for a long time in an improper purchase by his trustee, equity will not assist him to set aside the sale (*d*). In Price *v.* Byrn (*e*), Lord Alvanley refused the aid of the Court, because the bill had been delayed twenty years.

But laches does not apply to a body of creditors; who may, therefore, claim the aid of equity at a much more distant period after the sale than an individual can (*f*).

And although acquiescence may have the same effect as original agreement, and may bar such a remedy as this, yet the question as to acquiescence cannot arise until it is previously ascertained, that the *cestui que trust* knew his trustee had become the purchaser; for, while the *cestui que trust* continued ignorant of that fact, there is no laches in not quarrelling with the sale upon that special ground (*g*).

(*d*) See *ex parte* James, 8 Ves. jun. 337; Hall *v.* Noyes, 3 Ves. jun. 748, cited; and see 11 Ves. jun. 226; Morse *v.* Royal, 12 Ves. jun. 355; Medlicott *v.* O'Donel, 1 Ball and Beatty, 156.

(*e*) 5 Ves. jun. 681, cited; and see Norris *v.* Neve, 3 Atk. 26; Gregory *v.* Gregory, Coop. 201.

(*f*) Whichcote *v.* Lawrence, 3 Ves. jun. 740; and a case before the Court of Exchequer, 6 Ves. jun. 632, cited; York-Buildings Company *v.* Mackenzie, 8 Bro. P. C. by Tomlins, 42.

(*g*) *Per* Sir William Grant, 10 Ves. jun. 427; and see 2 Ball and Beatty, 129.

A purchase

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(*h*) Morse *v.* Royal, 12 Ves. jun. 355; Murray *v.* Palmer, 2 Scho. and Lef. 474; Roche *v.* O'Brien, 1 Ball and Beatty, 330; Wood *v.* Downes, 18 Ves. jun. 120; Dunbar *v.* Tredennick, 2 Ball and Beatty, 304. *Vide supra*, p. 238.

CHAPTER XV.

OF JOINT PURCHASES: PURCHASES IN THE NAMES OF THIRD PERSONS; AND PURCHASES WITH TRUST-MONEY: AND OF THE PERFORMANCE OF A COVENANT TO PURCHASE AND SETTLE AN ESTATE.

SECTION I.

Of Joint Purchases.

WHERE two or more persons purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, this is a joint tenancy, that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other (*a*) (I), but where the proportions of the money

(*a*) See Moyse v. Gyles, 2 Vern. 385; York v. Eaton, 2 Freem. 23; Thicknesse v. Vernon, 2 Freem. 84; Anon. Carth. 15; and see 3 Atk. 735; 2 Ves. 258; Rea v. Williams, MS. Appendix, No. 11; Aveling v. Knipe, 19 Ves. jun. 441.

(I) This distinction has not been thought satisfactory. A writer, to whom the profession is under great obligation, observes, that if the advance of consideration, generally, will not prevent the legal right, the mere inequality of proportion, which may naturally be attributed to the relative value of the lives, cannot have that effect. See 9 Ves. jun. 597, n. (b). The distinction, however, seems founded on rational grounds. Where the parties advance the money equally, it may be fairly presumed, that they purchased with a view to the benefit of survivorship; but where the money is advanced in unequal proportions, and no express intention appears to benefit the one advancing the smaller proportion, it is fair to presume

money are not equal, and this appears in the deed itself, this makes them in the nature of partners (*b*); and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the others, in proportion to the sums advanced by each of them. So if two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it (*c*).

And where the money is advanced in equal proportions, so that the purchasers are joint tenants in equity as well as at law, a conveyance by the purchasers to a trustee without any consideration, and without any express intent to sever the joint tenancy, will not have that effect; but the trust estate will go to the survivor, in the same manner as the legal estate would have done (*d*).

In all cases of a joint undertaking, or partnership, although the estate will survive at law, yet the survivor will in equity be a trustee for the representative of the deceased partner.

Thus, in a case (*e*) where five persons purchased lands in fee of the commissioners of sewers, and, in order to improve and cultivate these lands, afterwards entered into articles, whereby they agreed to be equally concerned as

(*b*) See 2 Ves. 258.

(*c*) *Per* Master of the Rolls, *in case* Lake *v.* Gibson, 1 Eq. Ca. Abr. 290, pl. 3.

(*d*) Rea *v.* Williams, MS. Appendix, No. 21.

(*e*) Lake *v.* Gibson, *ubi sup.* and see Hayes *v.* Kingdome, 1 Vern. 33; Jeffereys *v.* Small, 1 Vern. 217.

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presume that no such intention existed; the inequality of proportion can scarcely be attributed to the relative value of the lives, because neither of the parties can be supposed not to know, that the other may, immediately after the purchase, compel a legal partition of the estate, or may even sever the joint tenancy by a clandestine act.

to

to profit and loss, and to advance each of them such a sum, to be laid out in the manurance and improvement of the land; it was held by the Master of the Rolls, that they were tenants in common, and not joint tenants, as to the beneficial interest, and that the survivor should not go away with the whole; for then it might happen that some might have paid or laid out their share of the money, and others, who had laid out nothing, go away with the whole. And the decree was affirmed by Lord Chancellor King (*f*).

So where two persons took a building lease, and laid out money in erecting houses, they were held to be partners with respect to this property: and the survivor was decreed to be a trustee of a moiety for the representatives of the deceased (*g*).

But as the lands will survive at law, equity, on the general rule, that he who seeks equity shall do equity, will not relieve, unless the person seeking relief will do what he equitably ought to do.

Thus, in the first-mentioned case, the ancestor of the party seeking relief had quitted the concern for many years; since which time the other proprietors, to enable them to carry on their design, had purchased some other estates, which proved a losing concern; and the plaintiff was only relieved on contributing his share of the purchase money of the estates so bought, with interest from the time the money ought to have been paid (*h*).

Lord Chancellor King said, that this was plainly a tenancy in common in equity, though otherwise at law; and the defendant Craddock having only a title in equity,

(*f*) Lake v. Craddock, 3 P. Wms. 158; S. C. MS.

(*g*) Lyster v. Dolland, 1 Ves. jun. 431. See 2 Ves. jun. 631; and Elliot v. Brown, 9 Ves. jun. 507, cited.

(*h*) And see Senhouse v. Christian, 10 Ves. 157, cited.

that

that he must do equity; and that this was equitable in all its branches; for he had his election to drop all claim, or to take it on the same foot with the rest of the partners; and that it was not reasonable that he should be let into the account of the profits or loss of the undertaking until he had made his election (*i*).

If it be doubtful whether the purchasers bought the property to carry on trade, an inquiry will be directed before the Master to ascertain the fact (*j*) (I).

Where two or more persons agree for the purchase of an estate in moieties between them, subject to incumbrances, which are to be discharged out of the purchase money, the purchase is in equity considered to be made for their equal benefit, *and on a mutual trust between them*; and therefore, although one of them may have abatements made to him by some of the incumbrancers, of sums due for interest or otherwise, in consideration of services and friendship, and it is expressly agreed to be to his own use, yet equity will compel him to account to the other for the benefit of these advantages (*k*).

So a new lease obtained by one partner shall enure to both (*l*), although he obtained it clandestinely and on his own account (*m*).

If two persons purchase an estate subject to a mortgage, and the mortgage money is apportioned between them,

(*i*) MS. The judgment is not stated in any other printed book.

(*j*) See 1 Ves. jun. 435.

(*k*) Carter v. Horne, 1 Eq. Ca. Abr. 7, pl. 13.

(*l*) Burroughs v. Elton, 11 Ves. jun. 29.

(*m*) Featherstonhaugh v. Fenwick, 17 Ves. jun. 298.

(I) Whether the property as between the representatives shall be deemed real or personal, see Bell v. Phyn, 7 Ves. jun. 453; Bateman v. Shore, 9 Ves. jun. 500; Mackintosh v. Townsend, 1 Mont. Partn. notes, 97; Selkrig v. Davies, 2 Dow, 231.

and

and each of them covenants with the other to pay his share of the money, and to indemnify the other from it, they do not by those means make their personal estate, as between their real and personal representatives, the primary fund for payment of the mortgage money (*n*).

It seems that where two or more persons purchase an estate, and one, for instance, pays all the money, and the estate is conveyed to them both, the one who paid the money cannot call upon those who paid no part of it to repay him their shares of the purchase money, or to convey their shares of the estate to him: for by payment of all the money, he gains neither a lien nor a mortgage, because there is no contract for either; nor can it be construed a resulting trust, as such a trust cannot arise at an after-period; and perhaps the only remedy he has, is to file a bill against them for a contribution (*o*). Whenever, therefore, two persons agree to purchase an estate, it should be stipulated in the agreement, that if by the default of either of them the other shall be compelled to pay the whole, or greater part of the purchase money, the estate shall be conveyed to him, and he shall hold the entirety against the other and his heirs; unless he or they shall, within a stated time, repay the sum advanced on their account, with interest in the mean time.

But it has been held, that if one of two joint tenants of a lease renew, at his own expense, and the other party reap the full benefit of it, the one advancing the money shall have a charge on the other moiety of the estate, for a moiety of his advances on account of the fines, although such other moiety of the estate be in strict settlement at

(*n*) Forrester *v.* Lord Leigh, Ambl. 171. *Vide supra*, p. 73.

(*o*) See Wood *v.* Birch, and Wood *v.* Norman, Rolls, 7 and 8 March 1804; the decree in which case does not, however, authorise the observation, but the author conceives it to follow, from what fell from the Master of the Rolls at the hearing.

the

ime of the renewal. The case was considered to fall in the principle upon which mortgagees who renew hold interests have been decreed entitled to charge mount upon the lands (*p*).

here two or more persons purchase an estate, and onveyance is taken in the name of one of them, the may be proved by letters written subsequently to the hase; for the statute of frauds (*q*) does not require a trust shall be created by a writing (*r*); but that it be *manifested and proved* by writing, which means there should be evidence in writing, proving that was such a trust (*s*).

it although two persons enter into a treaty for the ase of an estate, and one of them desists, and per- the other to go on with the intended purchase, on romising, by parol, to let him have the part of the he desired; yet it seems that this agreement cannot forced on account of the statute of frauds.

Lomas *v.* Baily (*t*), which was a case of this nature, laintiff obtained a decree at the Rolls, it being in- l, that although it was an agreement parol, yet it was rt executed by the plaintiff's desisting from prose- g his purchase, who otherwise might have purchased imself, or at least have enhanced the price the de- nt was to pay, so that the defendant had a benefit ; and besides, it was a fraud (*u*), and like the case a man agreed to purchase as agent for another, would afterwards retain the purchase to himself. But an appeal to the Lord Chancellor, the decree was

Hamilton v. Denny, 1 Ball atty, 199.

29 Car. II. c. 3, s. 7.

See n. (1) to the last edit. of n Uses, p. 111.

Forster v. Hale, 3 Ves. jun. 696; 5 Ves. jun. 308; Randall v. Morgan, 12 Ves. jun. 67.

(*t*) 2 Vern. 627; and see Riddle v. Emerson, 1 Vern. 106.

(*u*) See Thynn v. Thynn, 1 Vern 296.

 reversed,

reversed, as being a parol agreement, within the provision of the statute against frauds.

Mr. Powell (*x*) refers to an anonymous case in Viner (*y*), which he conceives to be another report of the case of Lamas *v.* Baily, where the Lord Chancellor dismissed the bill, because there was no *absolute and positive* agreement, but the words were ambiguous and uncertain, and the statute intended to oust as well all such ambiguous agreements, as to prevent perjuries, &c. and this agreement would not bind, unless it were in writing. And Mr. Powell, therefore, conceives that the judgment turned on there being no *absolute* or *positive* agreement, the words being ambiguous and uncertain; and not on the ground that the forbearing by agreement to do an act might not be a part performance, and raise as strong an equity to have the benefit stipulated in return, as an act done.

In the later case of Atkins *v.* Rowe (*z*), some persons desirous of obtaining a lease of three houses, agreed that one of them should bid for all the houses, but that the lease should be for their joint benefit. Accordingly he bid, and a lease was made to him; and to a bill filed by the others to have the benefit of the lease, and that the purchaser might be decreed a trustee, he pleaded the statute of frauds in bar both to the discovery and relief. But the Lord Chancellor seemed of opinion, that the agreement, although by parol, was not within the statute, and ordered the plea to stand for an answer, with liberty to except, and the benefit of the plea to be saved to the hearing. Thus the case is reported in Moseley. It appears from the cases in the House of Lords (*a*), that the

(*x*) 1 Powell on Contracts, 310.

(*y*) 5 Vin. Abr. 521, pl. 32. Note, the case of Lamas *v.* Baily, is stated in the same page.

(*z*) Mose. 39; and see Crop *v.* Norton, stated *infra*.

(*a*) Cases, *Dom. Proc.* 1730.

defendant

defendant by his answer denied the agreement, and the cause being at issue, several witnesses were examined on both sides. There was a contrariety of evidence, but the plaintiff proved the agreement by one positive witness, corroborated by circumstances. But the Chancellor dismissed the bill, without costs, and his decree was affirmed by the House of Lords.

Upon the whole, therefore, the better opinion perhaps is, that an agreement of this nature cannot be enforced, although certainly it does not appear that the precise point has ever been decided, upon an absolute agreement clearly and undeniably proved.

From the case of Smith, treasurer of the West-India Dock Company *v.* the Mayor and Corporation of London (*b*), it should seem, that where two persons agree to purchase an estate, and one of them, by agreement between them, completes the purchase, and pays the money, the other must agree to accept the title, and pay his share of the purchase money, before he can call for an inspection of the title-deeds, in order to investigate the title; unless the one who purchased can be charged with such gross negligence, or wilful default, as will strip an agent, as such, of the protection which that character gives him in all transactions in which he duly acts according to his agency: and in case any such gross negligence or wilful default can be proved, the injured party will have a remedy in equity, although he may have paid his share of the purchase money.

(*b*) Ch. Dec. 16, 1801, and many previous days, MS.

SECTION II.

Of Purchases in the Name of Third Persons.

I. If a man purchase an estate, and do not take the conveyance in his own name only, the clear result of all the cases, without a single exception, is, that the trust of the legal estate, whether freehold, copyhold or leasehold; whether taken in the name of the purchaser and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or *successive*, results to the man who advances the purchase money (*c*), unless such a resulting trust would break in upon the policy of an act of parliament (*d*). And although the person in whose name the conveyance is taken, executes no declaration of trust, yet a trust will result for the person who paid the money by operation of law; this species of trust being expressly excepted out of the statute of frauds (*e*).

But, unless the trust arise on the face of the deed itself, the proofs must be very clear (*f*): and however clear they

(*c*) *Per* Lord C. B. Eyre, in Dyer *v.* Dyer, stated *infra*.

(*d*) See *ex parte* Houghton, 17 Ves. jun. 251; and see Redington *v.* Redington, 3 Ridg. P. C. 106.

(*e*) 29 Car. II. c. 3, s. 8. See Hungate *v.* Hungate, Toth. 184; Gascoigne *v.* Thwing, 1 Vern. 366; Howe *v.* Howe, 1 Vern. 415; Anon. 2 Ventr. 361, n. (3); O'Hara *v.* O'Neil, 21 Vin. Abr. 497, n.; 2 Bro. P. C. 39; Pelly *v.* Maddin, 21 Vin. Abr. 498, pl. 15; Sir Darcy Lever *v.* Andrews, 7 Bro. P. C. by Tomlins, 288; Ambrose *v.* Ambrose, 1 P. Wms. 321; *ex parte* Vernon, 2 P. Wms. 549; Smith *v.* Baker, 1 Atk. 385; Lloyd *v.* Spillet, 2 Atk. 148; Withers *v.* Withers, Ambl. 151; Lade *v.* Lade, 1 Wil. 21; Smith *v.* Lord Camelford, 2 Ves. jun. 713; Rider *v.* Kidder, 10 Ves. jun. 360.

(*f*) Gascoigne *v.* Thwing, 1 Vern. 366; Newton *v.* Preston, Prec. Cha. 103; Willis *v.* Willis, 2 Atk. 71; and see 1 Atk. 60; Ambl. 414; Acherley *v.* Acherley, 4 Bro. P. C. 67; and Smith *v.* Wilkinson, 3 Ves. jun. 705, cited; and 1 Dick. 328; and see Lench *v.* Lench, 10 Ves. jun. 511.

they may be, it seems doubtful whether parol evidence is admissible against the answer of the trustee denying the trust (*g*). And in cases of this nature the claimant, in opposition to the legal title, should not delay asserting his right, as a stale claim would meet with little attention (*h*).

It has been said (*i*), that if the consideration money is *expressed* in the deed to be paid by the person in whose name the conveyance is taken, and nothing appears in such a conveyance to create a presumption that the purchase money belonged to another, then parol proof cannot be admitted, *after the death of the nominal purchaser*, to prove a resulting trust; for that would be contrary to the statute of frauds and perjuries.

This proposition has been adopted by another writer (*k*), who says, that it should seem, that even the confession of the trust by the nominal purchaser, to countervail a declaration in writing, and create a trust for the party advancing the money, cannot be established by a third person, but must be made under *a judicial examination upon oath or by the party's own answer in equity*. This, he adds, seems understood both in the case of Ambrose *v.* Ambrose, and Ryall *v.* Ryall; and appears to flow from the proposition before stated; for, during the life of the nominal purchaser, no proof can be received of his parol confession, as not being the best existing evidence; and after his death, it is mere parol evidence contradicting the deed, and not of strength to raise a resulting trust.

In the first edition of this work the author submitted it

(*g*) Skett *v.* Whitmore, 2 Freem. 280; Newton *v.* Preston, Prec. Cha. 103. See Cottington *v.* Fletcher, 2 Atk. 155; [Bartlett *v.* Pickersgill, 4 East, 577, n. (b).

(*h*) Delane *v.* Delane, 7 Bro. P. C. by Tomlins, 279.

(*i*) See Mr. Sanders's note to Lloyd *v.* Spillet, 2 Atk. 150; and see his Essay on Uses, 1. 123; and see the 3d edit. of that work, p. 259, 260.

(*k*) Rob. on Stat. of Frauds, 99.

as his opinion, that the proposition, that parol proof could not be admitted after the death of the nominal purchaser, was not warranted by the authorities referred to in support of it (*l*), and that the statute is not more broken in upon by admitting parol proof after the death of the nominal purchaser, than it is by allowing such proof in his life-time. And this opinion seems to be confirmed by the late case of Lench *v.* Lench (*m*). The question there was, whether a purchase by the late husband of the plaintiff of an estate was made with some trust money of hers, of which he had obtained possession. Parol evidence was admitted of conversations with the husband, in order to prove the fact. The late Master of the Rolls, after premising that there was not only no covenant by the husband to purchase land, but no stipulation in the settlement that land should be purchased, but merely a proviso, that the trustees, with the wife's consent alone, might invest the money in land, said, that as to the ground that the purchase was made with the trust-money, all depended upon the proof of the fact, *for whatever doubts might have been formerly entertained on this subject, it is now settled, that money may in this manner be followed into the land in which it is invested; and a claim of this sort may be supported by parol evidence.*—His Honor then examined the weight of the testimony, which he held to be too contradictory and uncertain to be depended upon. So, in Sir John Peachy's case (*n*), Sir Thomas Clark, Master of the Rolls, laid it down, that frauds were out of the statute of frauds, for that the judges had resolved it was absurd that a statute

(*l*) Kirk *v.* Webb, Prec. Cha. 84; Walter de Chirton's case, cited *ibid.*; Newton *v.* Preston, Prec. Cha. 133; Gascoigne *v.* Thwing, 1 Vern. 366; Hooper *v.* Eyles, 2 Vern. 480; Crop *v.* Norton, 2 Atk. 74.

(*m*) See Lench *v.* Lench, 10 Ves. jun. 511. The point, I am told, was lately decided the same way in Ireland.

(*n*) Rolls, E. T. 1759, MS.

which

which was made to prevent frauds should be made a handle to support them. And therefore, if *A* sold an estate to *C*, *and the consideration was expressed to be paid by B*, and the conveyance made to *B*, the Court would allow parol evidence to prove the money paid by *C*.

Where the evidence is merely parol, although it is clearly admissible, yet it will be received with great caution. Evidence of naked declarations made by the purchaser himself is, as Sir William Grant observes, in all cases, most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection, may totally alter the effect of the declaration.

So Lord Hardwicke laid it down, that parol evidence might be admitted to show the trust, from the mean circumstances of the pretended owner of the real estate or inheritance, which makes it impossible for him to be the purchaser (*o*).

An express trust, although by parol only, will prevent the resulting trust (*p*); because resulting trusts are left by the statute of frauds and perjuries as they were before; and, previously to the act, a bare declaration by parol would prevent any resulting trust. Besides, an equitable presumption may be rebutted by parol evidence (*q*); for, as Lord Mansfield has observed, an equitable presumption is only a kind of *arbitrary implication* raised, to stand until some *reasonable proof* brought to the contrary.

Therefore parol evidence will be admitted to prove the

(*o*) Willis *v.* Willis, 2 Atk. 71; and see Ryall *v.* Ryall, 1 Atk. 59; Ambl. 413; and Lench *v.* Lench, 10 Ves. jun. 511.

(*p*) Lady Bellasis *v.* Compton, 2 Vern. 294. See Lord Altham *v.* the Earl of Anglesea, Gilb. Eq. Rep. 16; Roe *v.* Popham, Dougl. 25.

(*q*) Langfielde *v.* Hodges, Lofft, 230; Rider *v.* Kidder, 10 Ves. jun. 360.

purchaser's intention, that the person to whom the conveyance was made should take beneficially; and if satisfactory, he will be entitled to the estate (*r*); but the proof rests upon him to show, that the man from whom the consideration moved did not mean to purchase in trust for himself, but intended a gift to the stranger (*s*).

Where a man merely employs another person by parol, as an agent to buy an estate, who buys it accordingly, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds (*t*).

And although the agent be afterwards convicted of perjury in denying the trust, yet that will not enable the Court to decree a performance *in specie* (*u*); and, therefore, as the principal cannot avail himself, in any civil proceeding, of the conviction of the agent, he is a competent witness to prove the perjury (*x*).

In Crop *v.* Norton (*y*), Lord Hardwicke appears to have been of opinion, that this doctrine of resulting trust only extended to cases where the whole consideration is paid by one person, and the conveyance taken in the name of the other. He said, "this is where the whole consideration moves from such person; but I never knew it where the consideration moved from several persons; for this would introduce all the mischief which the statute of

(*r*) Taylor *v.* Alston, cited in Dyer *v.* Dyer, Watk. Copyh. 216, S. C. MS.; Goodright *v.* Hodges, *ibid.* 227; Lofft, 230; 2 East, 534, n.; Maddison *v.* Andrews, 1 Ves. 57.

(*s*) See 3 Ridg. P. C. 178.

(*t*) Bartlett *v.* Pickersgill, 4 Burr. 2255; 4 East, 577, n. (b). See Rastel *v.* Hutchinson, 1 Dick. 44.

(*u*) Bartlett *v.* Pickersgill, *ubi sup.*

(*x*) The King *v.* Boston, 4 East, 572. See Fell *v.* Chamberlain, 2 Dick. 484, *supra*, p. 100; and see the King *v.* Dalby, Peake's Ca. 12, and the cases cited in the note.

(*y*) 9 Mod. 233.

frauds

frauds was intended to prevent. Suppose several persons agree to purchase an estate in the name of one, and the purchase money appears to be paid by him only, I do not know any case where such persons shall come into this Court, and say, they paid the purchase money; but it is expected there should be a declaration of trust."

In the case of Wray *v.* Steel, the point called for a decision, and the Vice-Chancellor following the true principle, decided in favour of the resulting trust. What, his Honor asked, is there applicable to an advance by a single individual that is not equally applicable to a joint advance under similar circumstances (*z*)?

II. Before the statute of uses, if a father made a feoffment to a stranger without any consideration, the law raised an use by implication to himself; but if he made a feoffment to his son, no use arose to the father by implication; because the blood, which is a sufficient consideration, fixed and settled the estate in the son. And herein the law of trusts doth (as it ought to do) agree with the law of uses before the statute of H. VIII. (*a*).

Therefore, if a father purchase in the name of a child, although illegitimate (*b*), who is without a provision (*c*), or in the joint names of such a child and of another person (*d*), it will not be deemed a resulting trust for the father but a gift or advancement for the child (*e*); because

(*z*) 2 Ves. and Beam. 388.

(*a*) See Finch, 341.

(*b*) Beckford *v.* Beckford, Lofft, 490; Fearne's Posthuma, 327; Fonblanque's n. (1) to 2 Trea. Eq. 127, 2d edit.

(*c*) Elliot *v.* Elliot, 2 Cha. Ca. 231; and see Finch, 341.

(*d*) Lamplugh *v.* Lamplugh, 1 P. Wms. 112.

(*e*) Lady Gorge's case, 3 Cro. 550, cited; Lord Grey *v.* Lady Grey, 1 Cha. Ca. 296; Mumma *v.* Mumma, 2 Vern. 19; Shales *v.* Shales, 2 Freem. 252; 1 Eq. Ca. Abr. 382, pl. 9; Anon. 2 Freem. 128, pl. 151; Taylor *v.* Taylor, 1 Atk. 386.

a father

a father is under an obligation of duty and conscience to provide for his child in such case. And if the father die without having paid all the purchase money, his personal estate must pay it for the benefit of his child (*f*).

Where, by the custom of a manor, copyholds are granted for lives *successive*, it has been holden, that if the father pay the fine, a grant to children, as nominees, shall not be an advancement for them, but a trust for the father (*g*); and there seems some ground to support this distinction; because the father could not have taken the whole estate in his own name.

But this decision has been overruled, and it is now settled, that such a purchase is, upon the general rule, an advancement for the children, and not a trust for the father (*h*), where the grant is immediate to the children, or even to the father for their lives, if they can, according to the custom of the manor, take at law under such a grant (*i*): nor is it material that the purchase is of a reversion expectant upon the death of a stranger (*j*).

A purchase by a papist incapable of purchasing, in the name of a protestant son, is a stronger case for an advancement than a purchase by a protestant parent; because otherwise a constructive trust prohibited by statute would be raised (*k*).

It has already been observed, that to make it an advancement, the child must be unadvanced; but an ad-

(*f*) Redington *v.* Redington, 3 Ridgway's P. C. 106. See Redington *v.* Redington, 9th July 1805, printed case House of Lords.

(*g*) Dickenson *v.* Shaw, cited in Dyer *v.* Dyer, Watk. Copyh. 216; S. C. MS.

(*h*) Dyer *v.* Dyer, *ubi sup.*; and see Swift *v.* Davis, 8 East, 354, n.

(*i*) See Right *v.* Bawden, 3 East, 260; Smartle *v.* Penhallow, Lord Raym. 994.

(*j*) Finch *v.* Finch, 15 Ves. jun. 43.

(*k*) Redington *v.* Redington, 3 Ridg. P. C. 106. See *ex parte* Houghton, 17 Ves. jun. 251.

vancement

vancement in part is not material (*l*); and a child having only a reversion expectant upon a life estate, will be considered as unadvanced (*m*); and even if the child be advanced, yet if the father consider him unadvanced, that will be sufficient (*n*).

If the child is already provided for, and the father did not consider him unadvanced (*o*), or if the father considered the child, from the first, as a trustee for him, he will be held to be so (*p*); but the proof of this lies on the side of the person wishing to defeat the child's claim; and it seems, that although parol evidence of verbal declaration is admissible in support of the deed, it is inadmissible to create a trust against it (*q*).

In Swift *v.* Davis (*r*), where a father was the sole purchaser of an estate for three lives, who would take *successive*, and put in the lives of himself and his two sons; and at the same court obtained a license from the lord to himself and his mother (who had her widowhood right in the copyhold) to lease for seventy years; Lord Kenyon laid it down, that in such a case, if the father afterwards grant a lease by way of mortgage pursuant to such license to lease, and there be a custom in the manor for the first taker to dispose of the estate as against the other lives, such custom may so far operate as to divest the legal estate of the lives in reversion, and give it to the lessee. Or, if there were any doubt of that, or if the license of the lord might

(*l*) See Finch, 326.

(*m*) Lamplugh *v.* Lamplugh, 1 P. Wms. 111.

(*n*) Redington *v.* Redington, *ubi sup.*

(*o*) Elliot *v.* Elliot, 2 Cha. Ca. 231.

(*p*) Woodman *v.* Morrell, 2 Freem. 32; Swift *v.* Davis, 8 East, 354, n. See Murless *v.* Franklin, 1 Swanst. 13.

(*q*) Shales *v.* Shales, 2 Freem. 252; Lamplugh *v.* Lamplugh, 1 P. Wms. 111; Taylor *v.* Taylor, 1 Atk. 386; Redington *v.* Redington, 3 Ridg. P. C. 106; Finch *v.* Finch, 15 Ves. jun. 43.

(*r*) 8 East, 354, n.

be

be construed to extend only to the first taker of the new copy *jointly* with his mother, and the first taker *alone* executed such license after her death, yet a court of equity (even if the surviving life (the son) succeeded at law on his strict legal title) would make the son, the surviving life, convey to his father's lessee, and pay all the costs in law and equity.

Possession by the father, during the infancy of his child (*s*), will not be deemed subversive of the child's claim; for it cannot be supposed the parent would have named a youth as a trustee; and therefore his taking the profits must be intended to have been done by him as guardian to the son. In an early case (*t*), indeed, the tender years of the child was considered as evidence that the father did not purchase for his benefit, because he was too young to need an advancement.

A distinction has been drawn where the parent has taken the profits after the child's coming of age, and when of discretion to claim his right (*u*); in which case, it is said, the child shall be a trustee for the father. But this cannot be depended on. It seldom happens that the father gives the son possession during his life; and yet, as the Court observed in the case of Lord Grey *v.* Lady Grey (*w*), in all cases whatsoever, where a trust shall be between the father and son, contrary to the consideration and operation of law, the same ought to appear upon very plain and coherent and binding evidence; and not by any argument or inference from the father's continuing in posses-

(*s*) See Finch, 340, 341; Lamplugh *v.* Lamplugh, 1 P. Wms. 112; Mumma *v.* Mumma, 2 Vern. 19; Redington *v.* Redington, 3 Ridg. P. C. 106. Note, the case of the Attorney-general *v.* Bagg, Hard. 135, turned on fraud.

(*t*) Sir George Binion *v.* Stone, Nels. Cha. Rep. 68; 2 Freem. 169. See King *v.* Denison, 1 Ves. and Bea. 260.

(*u*) Lloyd *v.* Read, 1 P. Wms. 608; and see Gilb. Lex Prætoria, 271.

(*w*) Finch, 340.

sion,

sion, and receiving the profits, which sometimes the son may not in good manner contradict, especially where he is advanced but in part.

So the circumstance of the parent laying out money in repairs and improvements, will not make the child a trustee (*x*).

A declaration of trust by the father, *subsequently* to the conveyance, will not divest the gift to the child (*y*); and therefore a devise by him of the estate will be inoperative (*z*).

It is, however, quite clear, that according to the general rule of equity, if the father devise to another the estate bought in the name of the child, and make other provision for the child by his will, he would at this day be put to his election; although in the early case of Shales *v.* Shales (*a*). where these circumstances occurred, the child was not put to his election.

If the conveyance of the fee to a son is proved to be for a particular purpose, as to sever a joint tenancy, the child will be a trustee for the father (*b*).

A purchase by a father, in the joint names of *himself* and son, will be considered as an advancement for the child, if he is unprovided for; and consequently equity will not assist to defeat his legal claim (*c*).

But a purchase in the names of father and son, as joint tenants, has not been considered so strong a case for an

(*x*) Shales *v.* Shales, 2 Freem. 252; Mumma *v.* Mumma, 2 Vern. 19.

(*y*) Woodman *v.* Morrell, 2 Freem. 32; Elliot *v.* Elliot, 2 Cha. Ca. 231. See Redington *v.* Redington, 3 Ridgw. P. C. 106.

(*z*) Mumma *v.* Mumma, 2 Vern. 19; Dyer *v.* Dyer, Watk. Copyh. 216; S. C. MS.

(*a*) 2 Freem. 252.

(*b*) Baylis *v.* Newton, 2 Vern. 28; and see Birch *v.* Blagrave, Ambl. 264; Sir Walter Raleigh's case, Hard. 497, cited.

(*c*) Scroope *v.* Scroope, 1 Cha. Ca. 27.

advancement

advancement as it formerly was; it is said, that it does not answer the purpose of an advancement, for it entitles the father to the possession of the whole till a division, and to a moiety absolutely even after a division, besides the father's taking a chance to himself of being a survivor of the other moiety: nay, if the son dies during his minority, the father would be entitled to the whole by virtue of the survivorship, and the son could not have prevented it by severance, he being an infant (*d*). And accordingly, in a case (*e*) where a father purchased an estate in the names of himself and son, and had *no other estate* to which a judgment creditor could resort, the creditor was relieved in equity against the survivorship at law; the settlement being considered as voluntary and fraudulent against creditors (*f*).

But there does not appear to be much weight in the reasons above stated. It is evident that a moiety of some estates may be a much better provision than the entirety of others. The chance of survivorship which the father takes is an incident to the tenancy, and extends equally to the son, who, after he attains his majority, may sever the joint tenancy. If he die during his minority, it is as well that the estate should survive to the father, who paid the purchase money, and perhaps took the conveyance to himself and son as joint tenants, with the express view of advancing him only in the event of his attaining that age at which the law considers a man capable of managing his fortune. During the son's minority and the life of his father, upon whom should he be dependent, if not upon his own parent? If the father die during the son's minority, the estate will survive to him; so that, perhaps, it is impossible to contend with success, that a purchase by a

(*d*) *Per* Lord Hardwicke, 2 Atk. 480; and see Pole *v.* Pole, 1 Ves. 76.

(*e*) Stileman *v.* Ashdown, 2 Atk. 477.

(*f*) See 13 Eliz. c. 5.

parent

parent in the name of himself and child, as joint tenants, is not as strong a case for an advancement as a purchase in the name of the child solely. Fraud is of course an exception to every rule.

A purchase in the name of a child solely, or jointly with the parent's name, is not, however, within the 27 Eliz. (*g*). And therefore a subsequent purchaser, although *bonâ fide*, will not be relieved against it (*h*).

But such a purchase is expressly within the letter of the 21st of James I. (*i*) if the father be a trader at the time; and his being solvent will not protect the purchase (*k*). But if the purchase be made before the father engages in trade, and without any fraudulent purpose of becoming a bankrupt, it will be good, although the father afterwards commence tradesman, and is made a bankrupt (*l*).

If the father be dead, a purchase by the grandfather, in the name of his grandchild, is subject to the same rules as govern a purchase by a father in the name of his child; for on the death of the father, the grandchild is under the protection of the grandfather (*m*); but in Lloyd *v.* Read (*n*), this distinction does not seem to have been attended to. The case, however, depended upon its own peculiar circumstances.

So a purchase by a husband in the name of his wife, is also deemed an advancement and provision for her (*o*). But if a purchase in the name of wife or child be after marriage and voluntary, it may perhaps be fraudulent as

(*g*) C. 4.

(*h*) Lady Gorge's case, 3 Cro. 550, cited.

(*i*) See Walker *v.* Burrows, 1 Atk. 93.

(*k*) Fryer *v.* Flood, 1 Bro. C. C. 160; Glaister *v.* Hewer, 8 Ves. jun. 195.

(*l*) Crisp *v.* Pratt, Cro. Car. 548; Lilly *v.* Osborn, 3 P. Wms. 298; and see 8 Ves. jun. 200. 204.

(*m*) Ebrand *v.* Dancer, 2 Cha. Ca. 26.

(*n*) 1 P. Wms. 608.

(*o*) Kingdome *v.* Bridges, Back *v.* Andrews, 2 Vern. 67. 120.

against

against creditors (*p*), in like manner as if the settlement was of property actually vested in the husband, in even which case it seems that the husband must be proved to have been indebted, at the time of the settlement, to the extent of insolvency, in order to affect the settlement (*q*). It has, however, been strenuously argued, that a *purchase* is not within the operation of the statute of 13 Eliz; for, as the purchaser may give the money to the object of his bounty to purchase the estate for himself, he may by the same reason direct a conveyance to be made to him; and this seems to be the better opinion, where the case is clear of actual fraud (*r*).

A purchase by a *trader* in the name of his wife, seems subject to the same rules as a purchase by a trader in the name of his child (*s*). But a purchase by a trader of the land-tax on his wife's estate, for her benefit (*t*), or of an enfranchisement of his wife's copyhold estate, or money laid out by him in building on her estate, being mere voluntary expenditure, cannot be made a ground of charge against her or her estate by his creditors, although he was insolvent at the time (*u*).

On this subject it remains only to remark, that Lord Chief Baron Gilbert observes (*x*), that a difference is taken between a purchase in the name of a son and of a daughter; for though sons are often provided for by settlement of lands, yet daughters seldom are, therefore the presumption is not so strong. The learned author does not, how-

(*p*) Christ's Hospital *v.* Budgin, 2 Vern. 683.

(*q*) See Lush *v.* Wilkinson, 5 Ves. jun. 384.

(*r*) See Fletcher *v.* Sidley, 2 Vern. 490; Proctor *v.* Warren, Sel. Cha. Ca. 78; and 8 Ves. jun. 199.

(*s*) See Glaister *v.* Hewer, 8 Ves. jun. 195; 9 Ves. jun. 12; 11 Ves. jun. 377.

(*t*) Burrough's case, 17 Ves. jun. 267, cited.

(*u*) Campion *v.* Cotton, 17 Ves. jun. 263.

(*x*) Lex Prætoria, 272.

ever

ever, refer to any case in support of his position; and in Lady Gorge's case she appears to have enjoyed an estate purchased by her father, the Earl of Lincoln, in her name (*y*). Indeed, admitting the *general* rule, as to providing for daughters by settlement of lands, *where there is a son*; yet, in the case under consideration, the purchase itself is strong evidence of the intent, more especially as a woman is an unfit trustee of a real estate, as she might marry, and then a conveyance of the estate could not be obtained without a fine.

SECTION III.

Of Purchases with Trust Money.

If a trustee, or executor, purchase estates with his trust money or assets, and take the conveyance in his own name, without the trust appearing on the face of the deeds, the estates will not be liable to the trusts, although he die insolvent, unless the application of the purchase money can be clearly proved. And the same principle applies to a purchase by a husband with trust money belonging to his wife, of which he may have obtained possession from the trustee, whether with or without the wife's consent; or to a purchase by an agent or steward with monies remitted to him by his principal (*z*).

In the old cases (*a*) the courts of equity were much more strict in the proof they admitted of the application of the

(*y*) Lady Gorge's case, 3 Cro. 550, cited.

(*z*) Bennet v. Mayhew, 1 Bro. C. C. 232; 2 Bro. C. C. 287, cited.

(*a*) Kirk v. Webb, Prec. Cha. 84; Heron v. Heron, Prec. Cha. 163; Halcot v. Murkant, Prec. Cha. 168; Kendar v. Milward, 2 Vern. 440; Prec. Cha. 171. See Cox v. Bateman, 2 Ves. 19.

money, than they now are; but it was always very clear, that upon sufficient proof of the trust money having been laid out in the purchase of the estate, a trust would result and be decreed accordingly (*b*). Parol evidence is, in these cases, admissible either in the life-time, or after the decease of the trustee: but unless there are corroborating circumstances, as a writing under the trustee's hand, stating the application of the money, or the inability of the trustee to make the purchase with other funds (*c*), mere parol evidence of declarations supposed to be made by the purchaser, will be received with great caution.

Where a trustee or agent is bound by the trust to lay out the money in land, if he lay it out accordingly, it will be presumed to have been done in execution of the trust (*d*).

But if a trustee has considered himself entitled to the trust money for his own benefit, no presumption can be raised in opposition to this fact, that he intended any lands he may have bought with the trust money to be subject to the trust (*e*).

Here we may introduce a case, where a man, on his marriage, contracted to assure all such personal estate as he should, during the joint lives of him and his wife, be possessed of, upon certain trusts. He purchased a real estate, for which he paid partly out of his own monies, and partly out of monies borrowed on his personal security. It was insisted, that the real estate was bound by the trusts:

(*b*) Anon. Sel. Cha. Ca. 57; Lane *v.* Dighton, Ambl. 409; Balgney *v.* Hamilton, cited *ibid.*; Ryall *v.* Ryall, 1 Atk. 59; Ambl. 413; and see Earl of Plymouth *v.* Hickman, 2 Vern. 167.

(*c*) See Lench *v.* Lench, 10 Ves. jun. 511; Wilson *v.* Foreman, 2 Dick. 593, as corrected by the Master of the Rolls, 10 Ves. jun. 519; and see Anon. Sel. Cha. Ca. 57.

(*d*) See the cases in Sect. 4, *infra*.

(*e*) Perry *v.* Phelips, 4 Ves. jun. 108; 17 Ves. jun. 173; and see Cox *v.* Paxton, 17 Ves. jun. 329; Savage *v.* Carroll, 1 Ball and Beatty, 265, *supra*, p. 166.

but

but Lord Eldon determined, that it belonged to the heir, but charged for the benefit of the persons claiming under the trust, with the purchase money paid by the husband out of his own funds and lasting improvements on the estate; and also with the money borrowed, which he in his life-time paid off out of his personal estate, and the estate was held the primary fund for payment of the money borrowed. In this case it will be seen, that the application of the settled fund was clearly traced, for all the husband's personal estate was bound by the settlement; and the only question was, whether the *cestui que trust* should have the estate, or the trust fund, laid out in the purchase of it (*f*).

SECTION IV.

Of the Performance of a Covenant to purchase and settle an Estate.

WHERE a man covenants to purchase, and settle, or, having no real estate, to *convey* and settle lands, and afterwards accordingly purchases lands of equal or greater value, but neglects to settle them, yet they shall be held to have been purchased with an intent to perform the covenant, and shall accordingly go in performance of it (*g*), and the heir must give up the estate, although he is not the person entitled to the benefit of the covenant (*h*).

It is even a general rule in equity, that where a man

(*f*) Lewis *v.* Madocks, 8 Ves. jun. 150; 17 Ves. jun. 48. See Denton *v.* Davies, 18 Ves. 499.

(*g*) Wilcocks *v.* Wilcocks, 2 Vern. 558; Deacon *v.* Smith, 3 Atk. 323.

(*h*) Garthshore *v.* Chalie, 10 Ves. jun. 9.

covenants to do an act, and he does that which may *pro tanto* be converted to a completion of the covenant, he shall be presumed to have done it with such intention (*i*). Therefore, where the covenantor has purchased lands, but not of sufficient amount to wholly perform the covenant, yet they shall go in performance of it as far as they will extend (*k*). It may not be possible to lay out all the money in one purchase; but that is not a sufficient reason why the estates actually purchased should descend to the heir at law for his own benefit, to the entire ruin, perhaps, of the rest of the family.

The like principle has been extended to a case where the covenantor was to *pay* the money to *trustees*, to be by them laid out in the purchase of estates (*l*).

It is not material in these cases, that the purchase was to be made with the consent of persons whose consent was never even applied for (*m*), or within a limited time, and the purchase was not made till after the expiration of the time appointed (*n*). Nor is it important that there was a subsisting mortgage on the estate, upon which the covenantor took up money from another person in order to enable him to complete the purchase (*o*). And it will not vary the case, that the covenantor had an option to settle a rent charge instead of the lands themselves, unless he have shown an intention to avail himself of his right to elect (*p*).

(*i*) See Sowden v. Sowden, Cox's n. 3 P. Wms. 228.

(*k*) Lechmere v. Earl of Carlisle, 3 P. Wms. 211; For. 80, MS. App. No. 22, a fuller note of this part of Lord Talbot's judgment; Whorwood v. Whorwood, 1 Ves. 540; Sowden v. Sowden, 3 P. Wms. 228, n.; 1 Bro. C. C. 582. See 4 Ves. jun. 116, 117; 10 Ves. jun. 9. 516; Gardner v. Lord Townsend, Coop. 301.

(*l*) Sowden v. Sowden, 1 Bro. C. C. 582.

(*m*) Lechmere v. Earl of Carlisle, *ubi sup.*

(*n*) S. C.; and see 3 Atk. 329.

(*o*) Deacon v. Smith, 3 Atk. 323.

(*p*) *Ibid.*

But

But where a clear intent appears to *lay out* the entire sum in the *future* purchase of lands, estates of which the covenantor was seised at the time of the covenant, and which he permitted to descend, cannot go in performance of the agreement, because such clearly could not have been his intention (*q*).

And, to enure as a performance, the property purchased must be such as will answer the intent of the settlement (*r*). Therefore, under a covenant to purchase fee simple lands in possession, estates in reversion, expectant upon lives, will not go in performance (*s*), unless, perhaps, they fall into possession in the covenantor's life-time; neither will leaseholds for lives, nor terms of years, even with covenants to purchase the fee, go in performance, as they cannot descend to the heir (*t*).

So a moiety of a house would not be considered a kind of property within a covenant to purchase lands of inheritance: nor would lands, having a different descent, as borough English lands, which descend to the youngest son, instead of lands descendable to the eldest son, according to the course of the common law (*u*.) Neither will copyhold estates go in part performance of a covenant to purchase freehold lands, where the nature of the tenure would prevent compliance with the terms of the settlement, as where the estate is to be settled on one for life *without impeachment of waste* (*x*). But where this circumstance does not occur, copyhold estates may, it should seem, go in part performance of a covenant to purchase real estates (*y*),

(*q*) Lechmere *v.* Earl of Carlisle, For. 80, *et ubi sup.* See Davys *v.* Howard, 5 Bro. P. C. 552.

(*r*) See Lewes *v.* Hill, 1 Ves. 274.

(*s*) Lechmere *v.* Earl of Carlisle, 3 P. Wms. 211; Deacon *v.* Smith, 3 Atk. 323; Whorwood *v.* Whorwood, 1 Ves. 540.

(*t*) Lechmere *v.* Earl of Carlisle, *ubi sup.*

(*u*) Pennill *v.* Hallett, Ambl. 106.

(*x*) *Ibid.*

(*y*) Wilks *v.* Wilks, 5 Vin. Abr. 293, fol. 39. Note, the covenant was generally to purchase *lands.*

although Lord Hardwicke seems to have doubted whether copyhold lands could go in performance, as they are liable to different tenures and to forfeiture (*z*).

Where the purchase was made *bonâ fide* with an intent to perform the covenant, the lands must, it is conceived, in most cases be taken at the price paid for them (*a*), or at least at their value at that time. This construction, however, is not made to the prejudice of purchasers, for if the covenantor sell the estates, it will be evidence of his intention that they should not be bound by the settlement, and therefore they could not be followed in the hands of the purchaser (*b*). But it is no objection in these cases, that the arrangement will affect specialty creditors, for it is in the power of the owner of the estate to prefer one specialty creditor to another, because none of them have any specific lien on the lands (*c*).

It may be considered as a general rule, although it may not hold universally true, that a covenant to convey and settle lands, will not be a specific lien on the lands of the covenantor, but the covenantee will be a creditor by specialty. In one case, where a man gave a bond, before marriage, to convey sufficient freehold or copyhold estates, to raise 600 *l.* per annum, for his intended wife, in bar of dower, she was decreed to be a creditor, by specialty of her husband, and to be entitled to be paid the arrears of her annuity, out of his personal estate, in a course of administration; and if the same should not be sufficient, then out of the real estates of which he died seised in fee simple, *and if those should not be sufficient, then out of the real estates in settlement of which he was tenant in tail, provided such deficiencies did not exceed the amount of the dower*

(*z*) Whorwood v. Whorwood, 1 Ves. 540.

(*a*) Lechmere v. Earl of Carlisle, For. 80. See and consider Pennill v. Hallett, Ambl. 106.

(*b*) Smith v. Deacon, 3 Atk. 323.

(*c*) S. C.

which

which she would have been entitled to thereout, in case she had not accepted the annuity for her life, as aforesaid (*d*). Lord Thurlow, in a subsequent stage of the cause, said, that the Court had charged the real, in aid of the personal, by a very subtle equity, because, if she had not made a contract of forbearance of dower, the entailed estate would have been liable to her dower.

(*d*) Forster v. Forster, 3d Feb. 1787, MS. See 3 Bro. C. C. 490.

CHAPTER XVI.

OF THE PROTECTION AND RELIEF AFFORDED TO PURCHASERS BY STATUTES, AND BY THE RULES OF EQUITY.

IN the former chapters an attempt has been made to trace the purchase from its inception by contract, to its completion by conveyance; the subjects which may be said to arise out of the conveyance have been treated of; and it hath been considered who are incapable of purchasing estates. Let us now suppose the purchase to be completed, and proceed to inquire to what protection and relief purchasers are entitled. The protection and relief afforded to purchasers, appear to arise either from positive statutes, or from the rules of equity. The common law hath, indeed, done all which, from its peculiar nature, it can do in support of the claims of *bonâ fide* purchasers; for we are told, that the maxims of the common law, which refer to descents, discontinuances, non-claims, and to collateral warranties, are only the wise arts and intentions of the law to protect the possession, and strengthen the rights of purchasers (*a*). Lord Mansfield indeed held, that in every case between purchasers for valuable consideration, a court of equity must *follow*, and not *lead* the law. And the rules of equity were, in his time, pretty generally

(*a*) Finch, 104. See Bac. on Uses, 36.

adopted

adopted in the courts of law (*b*). It could not long escape observation, that from the peculiar constitution of this country, the rules of law and equity ought ever to continue distinct; and accordingly all the great judges who have succeeded Lord Mansfield have determined that the legal estate must prevail at law (*c*). We need, therefore, only consider, first, the statutes which have been passed for the protection or relief of purchasers: and, secondly, the rules of equity in favour of purchasers.

SECTION I.

Of fraudulent and voluntary Settlements, and Settlements with Powers of Revocation.

I. First then. By 27 Eliz. c. 4. (*d*) it is enacted, that all conveyances, grants, &c. out of any lands, tenements, or other hereditaments, to be had or made *for the intent and of purpose to defraud and deceive* such persons as shall purchase the same lands, tenements, or other hereditaments, so formerly conveyed, granted, &c. or any rent, profit or commodity, in or out of the same, shall be deemed and taken only as against such persons and their representatives as should so purchase for money or other good consideration, the same lands, tenements, or other hereditaments, or any rent, profits, or commodity in or out of the same, to be utterly void.

(*b*) Keech v. Hall, Dougl. 22; Weakley v. Bucknell, Cowp. 473. This practice did not escape the inquiring eye of Junius; see vol. 2. 41. 384.

(*c*) See 5 East, 138; 6 Ves. jun. 174; 3 Bos. and Pull. 162; and 1 Scho. and Lef. 66; Doe v. Morris, 1 Taunt. 52.

(*d*) Made perpetual by 30 Eliz. 18, s. 3.

But

But it is provided, that the act shall not extend to make void any conveyance, &c. to be made for good consideration, and *bonâ fide*, to any person.

And it is also enacted, that if any person shall make any conveyance, &c. of any lands, tenements or hereditaments, with any clause of revocation or alteration at his pleasure of such conveyance, &c. and shall afterwards sell the same to any person or persons for money or other good consideration paid or given (the said first conveyance, &c. not being revoked according to the power reserved by the said *secret* conveyance, &c.) then the said first conveyance, &c. as touching the lands, tenements and hereditaments so after sold, against the vendees, &c. shall be deemed and be void, and of none effect; provided that no *bonâ fide* mortgage should be affected by the act.

To take advantage of this statute, a person must have purchased *bonâ fide*, and for a valuable consideration, but the Court will not enter into the adequacy of the consideration, unless it was so small as to be palpably fraudulent (*e*). Whatever consideration would be sufficient to support an original settlement, will be sufficient to avoid a prior voluntary one. The subject of the sale must, however, be an existing lawful interest. Thus in a case mentioned by Sir Edward Coke, in his Commentary on Littleton (*f*), *A* had a lease of certain lands for sixty years if he lived so long, and forged a lease for ninety years absolutely, and he by indenture reciting the forged lease, for valuable consideration, bargained and sold the forged lease, and all his interest in the land to *B*. Sir

(*e*) Upton v. Bassett, Cro. Eliz 444; Doe v. Routledge, Cowp. 705; Nedham v. Beaumont, 3 Rep. 83, b; 2 And. 233; Doe v. Routledge, Cowp. 705. See Bullock v. Sadlier, Ambl. 764; Hill v. Bishop of Exeter, 2 Taunt. 69; Doe v. James, 16 East, 212. See 1 Ves. and Beam. 184; Treatise of Powers, 3d ed. p. 415.

(*f*) Co. Litt. 3, b. See Hatton v. Jones, Bull. N. P. 90.

Edward

Edward Coke adds, that it seemed to him that *B* was no purchaser within the statute of 27 Eliz. for he contracted not for the true and lawful interest, for that was not known to him; for then perhaps he would not have dealt for it, and the visible and known term was forged; and although by general words the true interest passed, notwithstanding he gave no valuable consideration, nor contracted for it. And of this opinion were all the judges in Serjeant's Inn.

In the construction of this act it hath been holden, that although the fraudulent conveyance is not made by the vendor himself, yet it is void against a purchaser. Therefore, if a father make a fraudulent lease, and then die, and the person claiming under him sell the estate, the purchaser shall avoid the lease, whether the vendor did or did not know of its existence (*g*).

And the statute being general, and made to suppress fraud, extends to fraudulent conveyances to the King. Therefore, in the case of Magdalen College (*h*), it was resolved by Lord C. J. Coke, that if tenant in tail be seised of land, the remainder over in tail or in fee, and he in remainder knowing the tenant in tail will alien the land, and by recovery bar his remainder, to the intent to deprive the tenant in tail of his birthright, and the power which the law gives him to bar the remainder, and on purpose and with intent to deceive the purchaser, grants his remainder to the Queen by deed enrolled, and afterwards tenant in tail, for a valuable consideration, aliens the land by a common recovery, and dies without issue, the purchaser shall enjoy the lease against the Queen, by the statute of Elizabeth. And of such opinion was Popham, C. J. openly in the Exchequer Chamber. This is a very important

(*g*) Burrell's case, 6 Rep. 72; Jones *v.* Groobham, Co. Litt. 3, b.
(*h*) 11 Rep. 66.

resolution,

resolution, and shows in the strongest view, how liberal a construction this statute hath received, for the Queen was not a party to the fraud, and by her prerogative at common law, the reversion in her could not be affected by a common recovery (*i*).

It hath been determined (*k*), that notice to a purchaser of a fraudulent conveyance is of no consequence, for the statute makes it absolutely void.

A conveyance for payment of debts generally, to which no creditor is a party, nor any particular debts expressed, is a fraudulent conveyance within this statute, against a subsequent purchaser for valuable consideration (*l*).

But if the conveyance were made with an honest intent, and the purchaser had notice of the trust, it seems that he will not be relieved against it (*m*). And upon the whole, as Mr. Roberts justly remarks (*n*), these are cases of such danger to purchasers, that a prudent adviser can hardly recommend a title which has been at all the subject of arrangements for the payment of debts remaining unsatisfied.

II. It has in numerous cases been holden, that voluntary settlements are within the meaning of the act, although the purchaser had direct notice of the settlement at the time of his purchase. This doctrine has, however, been frequently questioned, but appears to have been incontrovertibly settled by the case of Taylor *v.* Stile (*o*), which arose in Yorkshire.

(*i*) See Wiseman's case, and Chomley's case, 2 Rep. 15. 50; and see 2 Ro. Abr. 393, T. Recoverie Common.

(*k*) Gooch's case, 5 Co. 60, a.

(*l*) Leech v. Leech, 1 Cha. Ca. 249. See Wallwyn v. Coutts, 3 Mer. 707.

(*m*) Langton v. Tracey, 2 Cha. Rep. 16. See Stevenson v. Hayward, Prec. Cha. 310.

(*n*) Vol. Conv. 335.

(*o*) Chancery, 1763, MS.; and see Evelyn v. Templar, 2 Bro. C. C. 148.

In

In that case, *A* settled lands, after his marriage, on his wife for life, and then sold the lands to *B*, who had notice of the wife's estate for life, and took counsel's opinion on the point. *A* died, and his wife brought her bill to be let into her life estate. Lord Northington held the law to be clear, that a subsequent purchaser for a valuable consideration, though with notice, should set aside a voluntary settlement; but it being suggested that there was no valuable consideration, an issue was directed to try that fact, which coming on before Mr. Justice Bathurst, at York, he suffered the counsel to enter into the equity; and after hearing the argument, said, he knew Lord Hardwicke had determined, in twenty instances, in the same manner as Lord Northington. The consideration was proved, and the cause came on to be heard before the Chancellor on the equity reserved, who thereupon dismissed the bill.

And in a very recent case, Lord Chief Justice Mansfield held, that the Court could not, without overturning the settled and decided law, hold that the prior voluntary conveyance could defeat a conveyance to a purchaser for a valuable consideration (*p*). The point has been recently decided the same way by the Court of Exchequer (*q*), and since that, by the Court of King's Bench (*r*), although in the last case the purchaser had notice of the settlement; and upon a trial at *nisi prius*, Mr. Justice Heath attached some importance to the circumstance of notice, and the jury found for the defendants claiming under the settlement, conceiving, as I am told, the settlement not to be fraudulent within the statute, though voluntary. In a still later case, the rule was again confirmed by the Court of Common Pleas (*s*). Nor will a purchaser be affected by a

(*p*) Doe *v.* Martyr, 1 New Rep. 332.

(*q*) Doe *v.* Hopkins, 9 East, 70, cited.

(*r*) Doe *v.* Manning, 9 East, 59.

(*s*) Hill *v.* Bishop of Exeter, 2 Taunt. 69; and see 18 Ves. jun. 111, *per* Sir Wm. Grant.

covenant,

covenant, in the settlement, that the purchase money should be paid to trustees, to be laid out by them in other lands to be settled to the same uses (*t*).

Here it will be proper to consider, what is a voluntary settlement, and what will be deemed a valuable consideration within the act, so as to protect a settlement against subsequent purchasers.

Any conveyance executed by a husband in favour of his wife or children, after marriage, which rests wholly on the moral duty of a husband and parent to provide for his wife and issue, is voluntary, and void against purchasers by force of the act (*u*).

But a *purchase* in the name of a wife or child is not within the intention of the act, and consequently cannot be defeated by a subsequent purchaser (*x*): and on the ground of policy it seems, that a settlement by a widow, previously to her second marriage, of her estate on the children of the first marriage, will not be deemed fraudulent (*y*).

And a settlement made on a wife or children, *prior* to marriage, is a conveyance for valuable consideration, by reason of the marriage itself (*z*), but a settlement after a marriage in Scotland, will not be deemed a settlement upon valuable consideration, although, subsequently to it, the marriage is re-celebrated in England (*a*).

The marriage consideration runs through the whole settlement, so far as it relates to the husband, and wife, and

(*t*) Evelyn *v.* Templar, 2 Bro. C. C. 148. See 18 Ves. jun. 91. 93. 112.

(*u*) Woodie's case, cited in Colvile *v.* Parker, Cro. Jac. 158; Goodright *v.* Moses, 2 Blackst. 1019; Chapman *v.* Emery, Cowp. 278; Evelyn *v.* Templar, 2 Bro. C. C. 148. See Parker *v.* Serjeant, Finch, 146.

(*x*) *Supra*, ch. 15, s. 2, div. 11.

(*y*) Newstead *v.* Searles, 1 Atk. 265. See Cowp. 280; Cotton *v.* King, 2 P. Wms. 674.

(*z*) Colvile *v.* Parker, Cro. Jac. 158; Douglas *v.* Ward, 1 Cha. Ca. 99; Brown *v.* Jones, 1 Atk. 188.

(*a*) *Ex parte* Hall, 1 Ves. and Beam. 112.

issue.

issue (*b*). Whether the marriage consideration will extend to remainders to collateral relations, so as to support them against a subsequent sale to a *bonâ fide* purchaser, is a subject which has been frequently discussed (*c*).

In a case in Lane (*d*), it is stated to have been held, that "if a man doth, in consideration that his son shall marry the daughter of *B*, covenant to stand seised to the use of the son, for life, and after to the use of other his sons, in reversion or remainder; these uses, thus limited in remainder, are fraudulent against a purchaser, though the first be upon good consideration, viz. marriage."—In this case, therefore, although the settlor was under a moral obligation to provide for his sons, yet the remainders were not held good. They were, it will be observed, to take effect after a vested estate for life only. The case of Jenkins *v.* Keymis (*e*) has sometimes been considered a case, where the consideration of a marriage, and marriage portion, was held to run through all the estates raised by the settlement on the marriage, though the marriage was not concerned in them (*f*). The point, however, was not decided. It was merely the inclination of Hale's opinion. It was not necessary to decide the point, for Sir Nicholas was tenant for life, and Charles tenant in tail, with remainders over; the concurrence of both, therefore, was essential to give effect to the settlement, which brings it within the rule laid down in Roe *v.* Mitton (*g*). Besides, the son paid to his father, the portion which he received with his wife (*h*). Lord Keeper Bridgman is also reported, by

(*b*) Nairn *v.* Prowse, 6 Ves. jun. 752.

(*c*) See 6 Ves. jun. 750; 18 Ves. jun. 92.

(*d*) Lane, 22; and see 2 Ro. Rep. 306; Jason *v.* Jervis, 1 Vern. 286.

(*e*) 1 Lev. 150. 237; 1 Cha. Ca. 105.

(*f*) See 9 East, 69.

(*g*) *Vide infra*, and 18 Ves. jun. 92.

(*h*) See 1 Cha. Ca. 103.

Levinz,

Levinz, to have agreed with Hale, that the marriage and portion of the first wife would extend to the issue of the second; but this opinion was extrajudicial, inasmuch as he relieved against the defective execution of the power (*i*); and it is observable, that no such opinion is stated in the report in Chancery (*k*). The case of White and Stringer (*l*) does appear to be an authority for such limitations, after a *vested* estate tail; *the remoteness of the remainder was much relied upon in its favour.* But even in that case there were special circumstances; the remainder was excepted in the purchase deed, and the purchaser took a collateral security against it. It may be thought, therefore, that he only purchased the reversion in fee which was in the settlor from whom he bought. The case of Osgood *v.* Strode (*m*), like Jenkins and Keymis, depends on the circumstance, that the father and son had each an interest in the estate, and one could not make the settlement without the other. Lord Macclesfield, however, considered the marriage portion not to go beyond the limitations to the husband, and wife, and issue; and his subsequent observations are addressed to creditors, and not to *purchasers.* The case of Roe and Mitton (*n*) depends on the same principle, and is so far an authority against the validity of the remainders, that the marriage consideration, alone, was not considered sufficient to support the limitations to the brothers. Lord Eldon lately observed (*o*), that in the case of a father, tenant for life, with remainder to his son in tail, they may agree, upon the marriage of the son, to settle, not only upon his issue, but upon the brothers and uncles of that son: and the question would be, whether they, *though not within the consideration*

(*i*) See 1 Lev. 237.
(*k*) See 1 Cha. Ca. 105.
(*l*) 2 Lev. 105. See 2 P. Wms. 255.
(*m*) 2 P. Wms. 245.
(*n*) 2 Wils. 356.
(*o*) 18 Ves. jun. 92.

sideration of the marriage, are not within the contract between the father and son, both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations, and to say to each other, "I will not agree unless you will so settle." The Court, his Lordship added, has held such a claim not to be that of a mere volunteer, but as falling within the range of the consideration. The case of Goring *v.* Nash (*p*), does not apply to the case under consideration. It was a question upon the specific execution of articles, and the rule of equity cannot weaken the effect of the statute.

This hasty review of the authorities seems to show, that the question was still open. A case lately occurred which seems to call for a clear decision upon the point (*q*). A man, previously to his marriage, settled an estate to the use of himself, for life; remainder to trustees, in the usual way, to preserve; remainder to the first and other sons of the marriage, successively in tail male; remainder to the first, and other sons of the husband, by any after-taken wife, successively in tail male; remainder to the daughters of the intended marriage, as tenants in common in tail, with cross remainders between them in tail, with reversion to himself in fee. The marriage took effect, and the wife died, in her husband's life-time, without issue. The husband, not having been married again, mortgaged the estate. The legal estate was outstanding, and the question was, whether it was to be conveyed to the mortgagee or not. A case was directed to the King's Bench, in which the settlement was stated as a legal settlement: and it was stated, that the settlor had sold for a full and valuable consideration. The question for the opinion of the Court was, whether the conveyance to the

(*p*) 3 Atk. 186.

(*q*) Clayton v. Lord Wilton, before Lord Eldon, Ch.

 purchaser

purchaser was a good and valid conveyance, for a valuable consideration, against the issue of the plaintiff's second marriage. Lord Ellenborough, and the other Judges of B. R. (*r*), certified their opinion, that the conveyance, by the plaintiff, to the purchaser, was *not* a good and valid conveyance against the issue of the plaintiff's second marriage.

In the above case, therefore, the limitations to the collaterals were supported: but it is observable, that in order to support the limitations to the daughters of the first marriage, it was necessary to support the remainders to the sons of the second marriage. That was of itself a sufficient ground to support the remainders. It has, on the same principle, been considered, that an estate to a stranger may be supported, under a covenant to stand seised, if required to give effect to subsequent limitations within the consideration.

The same circumstances precisely, however, appear to have occurred in Roe *v.* Mitton, but this ground does not appear to have been urged in its support. It was decided, upon the ground before-mentioned: and Lord C. J. Wilmot said, that the whole of the question turned upon that. It is scarce possible to suppose, that the question was not discussed at the bar.

In a recent case, in Ireland (*s*), the precise point seems to arise, although the facts are very numerous. In a settlement, previous to marriage, after the limitations to the issue of the marriage, which failed, remainders to the collateral relations of the settlor were added, under which the grandson of an *uncle* of the settlor claimed. The settlor sold the estate to a purchaser, with full notice of the settlement. Upon a trial in the Court of Common Pleas, in Ireland,

(*r*) On the 31st May 1813.

(*s*) Fairfield *v.* Birch. The special verdict is shortly stated in Appendix, No. 23.

Lord

Lord Norbury, C. J. and Mr. Justice Mayne, were in favour of the defendant: and Mr. Justice Fox, and Mr. Justice Fletcher, in favour of the plaintiff. The latter, *pro forma*, allowed his opinion to be entered up for the defendant, and a writ of error was accordingly brought; but the author has not learned how the point was finally decided.

Since the above observations were written, the case of Johnson *v.* Legard has occurred, in which the abstract point was stated for the opinion of the Court of King's Bench. The writer argued himself into the belief that the marriage consideration did extend to collaterals. In that case, the wife had only a rent-charge, and therefore it might be supposed, that she stipulated for the settlement of the estate in remainder, on her husband's brothers, in order that the family dignity might be maintained, and her annuity be regularly paid. The Court of King's Bench certified their opinion that none of the limitations to the collaterals was a good and valid limitation, as against the purchaser; and the Vice-Chancellor, without hearing any argument on this point, confirmed the certificate (*t*). The case is now before the Lord Chancellor on appeal.

If an agreement be entered into before the marriage for a settlement of the estate (*u*), or the husband receive an additional portion with his wife (*w*), the settlement, although made after marriage, will be deemed valuable. So, even an agreement to pay the husband a sum of

(*t*) Ch. 20, July 1818, MS.; 3 Madd. 283; *vide infra*.

(*u*) Griffin *v.* Stanhope, Cro. Jac. 454; Sir Ralph Bovie's case, 1 Ventr. 193; but *qu.* where the agreement before the marriage is by parol. See Randall *v.* Morgan, 12 Ves. jun. 74; Battersbee *v.* Farrington, 1 Swanst. 106; 1 Wils. 88; and see Treat. of Powers, 3d edit. p. 421.

(*w*) Colvile *v.* Parker, Cro. Jac. 158; Jones *v.* Marsh, For. 64; Stileman *v.* Ashdown, 2 Atk. 477; Ramsden *v.* Hylton, 2 Ves. 304.

money, as a portion, will support a settlement made after marriage, if the money is paid according to the agreement (*x*). And where a woman has been married indiscreetly, and a trustee of a sum of money which the husband is entitled to in right of his wife, will not pay it unless he make a settlement on his wife, and a settlement is accordingly made, the settlement will equally be supported as if a bill had been brought against the husband to make a provision for his wife (*y*).

So the concurrence of the wife in destroying an existing settlement on her for the benefit of the husband, is a sufficient consideration for a new settlement, although much more valuable than the former (*z*). And the better opinion, as well upon principle as in point of authority seems to be, that the wife joining in barring her dower, for the benefit of her husband, will be a sufficient consideration for a settlement on her (*a*). It has been decided, that the wife parting with her jointure is a sufficient consideration. Now, if that which comes in lieu of dower is a valuable consideration, surely the dower itself must be equally valuable. Besides, where a woman is entitled to dower, the estate cannot be sold to advantage without her concurrence; she is a necessary party to any arrangement respecting the estate, and that alone seems a sufficient ground to support a settlement on her.

But if an unreasonable settlement be made upon a wife in consideration of her releasing her dower, it seems that equity in favour of subsequent purchasers will restrain her to her dower (*b*).

(*x*) Brown *v.* Jones, 1 Atk. 188.

(*y*) *Ibid.*

(*z*) Scott *v.* Bell, 2 Lev. 70; Ball *v.* Bumford, Prec. Cha. 113; 1 Eq. Ca. Abr. 354, pl. 5. See Clerk *v.* Nettleship, 2 Lev. 148.

(*a*) Lavender *v.* Blackstone, 2 Lev. 146. See and consider Evelyn *v.* Templar, 2 Bro. C. C. 148; 18 Ves. jun. 91; Pulvertoft *v.* Pulvertoft, 18 Ves. 84.

(*b*) Dolin *v.* Coltman, 1 Vern. 294.

If,

If, upon a separation, the husband settle an estate upon his wife, and a friend of her's covenant to indemnify the husband against any debts which she may contract, this will be a sufficient consideration to uphold a settlement as valuable, and not within the statute (*c*). Indeed, the Courts will anxiously endeavour to support a fair settlement, and nearly any consideration will be sufficient for that purpose. Therefore, if a person, whose concurrence the parties think essential, join in a settlement, his concurrence will be deemed a valuable consideration, although he did not substantially part with any thing (*d*).

It may be observed, that the statute of Elizabeth does not affect settlements of personal estate (*e*). Equity will not assist a mere stranger in making good a voluntary settlement upon him, unless the property was so transferred as to create the relation of trustee and *cestui que trust*. In a late case, however, a voluntary assignment of an equitable reversionary interest to trustees, for a stranger, was established, although, as the settlement was merely equitable, the person claiming under it of course had not any right to the property at law (*f*). This decision is of great importance. The principle upon which it was decided should be applied with great caution to other cases.

III. We have seen what will be deemed a fraudulent

(*c*) Stephens *v.* Olive, 2 Bro. C. C. 90; King *v.* Brewer, *ibid.* 93, n. See however Lord Eldon's argument in Lord St. John *v.* Lady St. John, 11 Ves. jun. 526; Worrall *v.* Jacob, 3 Mer. 256.

(*d*) Roe *v.* Mitton, 2 Wils. 356. See Myddleton *v.* Lord Kenyon, 2 Ves. jun. 391; Hill *v.* Bishop of Exeter, 2 Taunt. 69; and 18 Ves. jun. 92.

(*e*) *Per* Sir Wm. Grant, in the case of Sloane *v.* Cadogan, *infra*.

(*f*) Sloane *v.* Cadogan, Rolls, Dec. 1808, MS. Appendix, No. 24. This case involved an important question upon the execution of a power. See *ex parte* Pye, 18 Ves. 140.

or voluntary conveyance; but although a deed be merely voluntary or fraudulent in its creation, and voidable by a purchaser (*i. e.* would become void by a person purchasing the estate), yet it may become good by matter *ex post facto:* as if a man make a feoffment by covin, or without any valuable consideration, and the feoffee make a feoffment for valuable consideration, and then the first feoffor enter and make a feoffment for valuable consideration; the feoffee of the first feoffee shall hold the lands, and not the feoffee of the first feoffor: for although the estate of the first feoffee was in its creation covinous, or voluntary, and therefore voidable, yet when he enfeoffed a person for valuable consideration, such person shall be preferred before the last (*g*).

Lord Eldon has applied this rule to persons having only equitable rights. For where a person who had an absolute power of appointment over a sum of money to be raised under a trust term, directed part of it to be raised in favour of a volunteer, who afterwards mortgaged such part, although the money appointed was deemed assets as between the creditors of the appointor and the appointee, yet the claim of the purchaser was preferred to that of the creditors; he having a preferable equity (*h*).

If a voluntary grantee gain credit by the conveyance to him, and a person is induced to marry him on account of such provision, the deed, though void in its creation as to purchasers, will, on the marriage being solemnized, no longer remain voluntary, as it was in its creation, but

(*g*) Prodgers *v.* Langham, 1 Sid. 133; Andrew Newport's case, Skin. 423; Wilson *v.* Wormal, Godb. 161, pl. 226; Doe *v.* Martyr, 1 New Rep. 332; and see Parr *v.* Eliason, 1 East, 92. See also Lady Burg's case, Mo. 602; and 3 Atk. 377.

(*h*) George *v.* Milbank, 9 Ves. jun. 190. See 1 Mer. 638.

will

will be considered as made upon valuable consideration (*i*).

And it is to be inferred from a late decision (*k*), that though it does not appear, that the friends of the wife did speculate upon the provision, and take it into consideration, yet it must be presumed that they did act upon it; and it cannot afterwards be disturbed. In the case alluded to, the question was, whether the husband, who was tenant for life, with remainder to his sons in strict settlement, had any equity to be relieved against the settlement, as made under an undue influence of parental authority; and it was determined, that the husband could not disturb it by reason of his subsequent marriage, although it did not appear that the friends of the wife took the settlement into consideration. The same principle applies to the case under consideration.

Notwithstanding the decisions as to voluntary settlements, it is seldom that a purchaser can be advised to accept a title where there is a prior settlement; for although apparently voluntary, yet if a valuable consideration were paid or given, parol evidence would be admissible of the transaction, in order to support the deed, and rebut the supposed fraud. This seems to be admitted by all the cases (*l*). And in Ferrars *v.* Cherry (*m*), it was even holden, that although a settlement was apparently voluntary, and made after marriage, yet if the purchaser had notice of the settlement, and it prove to have been

(*i*) Prodgers *v.* Langham, 1 Sid. 133; Kirk *v.* Clark, Prec. Cha. 275; S. C. by the name of Heisier *v.* Clark, 2 Eq. Ca. Abr. 46, pl. 13; Doe *v.* Routledge, Cowp. 705; East India Company *v.* Clavell, Gilb. Eq. Rep. 37; Prec. Cha. 377; and see 9 Ves. jun. 193; O'Gorman *v.* Comyn, 2 Scho. and Lef. 147; Crofton *v.* Ormsby, *ibid.* 583.

(*k*) Brown *v.* Carter, 5 Ves. jun. 862.

(*l*) See particularly Chapman *v.* Emery, Cowp. 278.

(*m*) 2 Vern. 384.

made in pursuance of articles before marriage, he would be bound by it, and could not protect himself by a prior legal estate, as he ought to have inquired of the wife's relations, who were parties to the deed, whether it was voluntary, or made pursuant to an agreement before marriage. Lord Hardwicke, indeed, has said, that he inclined to think it was in this case left uncertain on the face of the settlement, whether it was made before marriage or not; and he denied the authority of the case (*n*).

This opinion of Lord Hardwicke's cannot be safely relied on. Indeed, if notice of a settlement apparently voluntary, but which turns out to be made on valuable consideration, should not be deemed notice to a purchaser of the consideration, yet, unless he has a prior legal estate, he cannot protect himself against the settlement. Both parties being purchasers, equity must stand neuter, and the person claiming under the conveyance must recover at law.

There are but few cases on the effect of an *agreement* by the settlor to sell an estate after a voluntary settlement of it. In Leach *v.* Dean (*o*), the plaintiff's suit was to be relieved upon articles of agreement for the purchase of lands from the defendant, who before the articles had by deed conveyed the estate to his son, and the Court made the decree as prayed; "but as to the voluntary conveyance, the same is not hereby impeached, as between the father and son for any advancement, or any other thing thereby settled on the son, other than making good the articles of agreement; but the trustees to be paid their debts and engagements out of the purchase money." It does not appear that the purchaser had notice of the settlement at the time he contracted. It was altogether a

(*n*) Senhouse *v.* Earle, Ambl. 285. See 2 Ves. 60, n.
(*o*) 1 Cha. Rep. 78.

voluntary

voluntary settlement. So in Douglasse *v.* Ward (*p*), the settlement was after the settlor's first marriage on himself for life, remainder to his first and other sons in tail, and was therefore voluntary throughout. Previously to his second marriage, in consideration of a portion, he agreed to settle a jointure on his second wife, out of the settled estate, and she was relieved against her own issue, who claimed under the settlement. It does not appear that she had notice of the settlement, and at the time of her articles, there was no person *in esse* entitled under the settlement, and the settlor himself could have destroyed the contingent remainders. Parry *v.* Carwarden (*q*), was also a suit by a purchaser, who had no notice of the settlement, and there the settlor herself filed a bill to set aside the settlement, but died before the cause was at issue.

The cases, therefore, do not carry the doctrine very far. They were all cases in which the *purchaser* was plaintiff, and in none of them had he notice of the settlement. It is now settled, after a great struggle, that a purchaser under a *conveyance* may avoid a voluntary settlement, although he had notice of it, but that decision ought not to induce *equity* to consider Leach *v.* Dean, and that line of cases, as authorities for decreeing a specific performance where the purchaser has notice. If a construction of a statute be made, which it is too late to overrule, but which, it is admitted, ought never to have been established, the principle of the rule should not be pushed to its greatest extent, but the rule should rather be confined strictly to the very circumstances under which it was established.

In Bennet *v.* Musgrove (*r*), Lord Hardwicke said, the distinction in equity was, that where a subsequent pur-

(*p*) 1 Cha. Ca. 90. (*q*) Dick. 544. (*r*) 2 Ves. 51.

chaser

chaser for a valuable consideration would recover the estate, and set aside or get the better of a precedent voluntary conveyance, if that conveyance was fairly made, without actual fraud, the Court will say, Take your remedy at law; but wherever the conveyance is attended with actual fraud, though they might go to law by ejectment, and recover the possession, they may come into this Court to set aside that conveyance; which is a distinction between actual and presumed fraud, from its being merely a conveyance; and he adhered to the same rule in Oxley *v.* Lee (*s*).

From this it might be inferred, that equity would not compel a specific performance in favour of a purchaser who bought *with notice* of a prior voluntary conveyance made without fraud. But in a recent case, where, after a voluntary settlement, the settlor entered into a contract to sell the settled estate to a person with full notice of the settlement, the Master of the Rolls, on mature consideration, decreed a specific performance against the parties claiming under the voluntary settlement (*t*); and Lord Eldon appears to have approved of the decision (*u*), but his Lordship was not called upon to consider the point. It is certainly a very strong decision. The construction that a *bonâ fide* voluntary settlement was void under the statute against a subsequent purchaser, who bought with notice, was not established without great opposition, and has always been considered a harsh interpretation. But the statute only operates where the purchaser acquires the estate under a conveyance. Equity generally follows the law; and therefore a sale of an equitable estate must, like a sale of a legal estate, operate to defeat a prior voluntary settlement; but that rule does not seem to apply to this

(*s*) 1 Atk. 562.

(*t*) Buckle *v.* Mitchell, 18 Ves. jun. 101.

(*u*) Metcalfe *v.* Pulvertoft, 1 Ves. and Beam. 180.

case,

case, where the contracting party has all his legal right, and the question is not in what channel an equitable interest actually *in esse* shall go, but whether the purchaser has any equitable interest, or, in other words, whether the Court will lend him its extraordinary aid, in order to carry the contract into a specific execution, instead of leaving him to his remedy at law. It were difficult to maintain, that the statute requires, by implication, equity to interpose, or that the interposition of the Court is called for by analogy to the legal rule; and unless that could be established, the plaintiff in such a suit might, with propriety, be told, that he did not come there with clean hands. He knew that the seller had already settled the estate on another, and that he could not break through the settlement unless by the circuitous route of a sale. This was a purpose to which the plaintiff ought not to have lent himself, and at least he could not complain that he was left to his regal right, and that equity, who would not suffer the settlor to break through the settlement for his own benefit, would not assist even a purchaser in defeating it where he bought with notice. The act relieves a man who has actually bought and paid for the estate, and obtained a conveyance of it; but it does not provide for the case, where, not having completed his contract, he would not be damnified by the settlement; but would have his legal remedy against the vendor for breach of contract. Such a case did not call for any legislative remedy, and equity, it may be thought, ought to stand neuter.

In Buckle *v.* Mitchell, however, the settlement was subject to all the specialty and simple contract debts then due, *or to be due*, from the settlor. The bill was filed after the seller's death, but that circumstance does not appear to have received much consideration.

In

In the case of Burke *v.* Dawson (*x*), the Master of the Rolls, I am told, seemed to be of opinion, that although a *purchaser*, subsequently to a voluntary conveyance, might compel a specific performance, yet the *vendor* could not enforce the execution of the contract against an unwilling contractor. Indeed this seems to flow from the rule, that the voluntary conveyance is binding on the settlor himself; and the statute of Elizabeth was passed to protect purchasers, and not to enable persons to break through *bonâ fide* settlements, although made voluntarily, and without consideration.

In the late case of Smith and Garland (*y*) the very point arose. The bill was filed by the seller, who made the voluntary settlement. The defendant, the purchaser, bought without notice. He raised the objection to the title on account of the settlement by his answer, but submitted to perform the contract if a good title could be made. The late Master of the Rolls, in a judgment which will long be remembered by those who heard it, expressly distinguished the case from his former decision in Buckle and Mitchell, and decided that the settlor cannot maintain a bill for a specific performance. For the settlement was binding on him, and he had no right to disturb it.

In the later case of Johnson *v.* Legard, the settlement was in consideration of a marriage, and was not voluntary throughout. By an agreement in writing, in October 1807, Sir John Legard, the settlor, agreed to sell and convey the estate to Mr. Watt, before the 6th April 1808. And Mr. Watt agreed to secure, by mortgage of the estate and his bond, the purchase money with interest; which principal sum was to remain upon the security at interest during the life of Sir John Legard, and for twelve calendar

(*x*) Rolls, March 1805, MS. (*y*) Smith *v.* Garland, 2 Mer. 123.

months

months afterwards. And it was agreed, that if Watt, his heirs or assigns, should be evicted from or deprived of the possession of the estate by any issue male of Sir John Legard, *or by any other person claiming or deriving title under him*, then the sums laid out in improvements or necessary alterations were to be repaid with interest, and also the purchase money; and the security for any part unpaid was to be void. Sir John Legard died. His creditors filed a bill against the remainder-men under the settlement, and against Watt, praying a specific performance. Watt by his answer objected to the title on account of the settlement, but submitted to perform the agreement on having a good title. By the decree it was ordered, that a case should be made for the opinion of the Judges of the King's Bench, and that such case should state, that a conveyance was actually made of the estate in question for a valuable consideration, by Sir John Legard, in his lifetime; and that the question should be, whether the limitations to the collaterals were good against the purchaser; and further directions were reserved. The result of the case before the King's Bench has already been stated. The cause came on before the Vice-Chancellor on further directions (*z*). The counsel for the remainder-men relied upon the case of Smith *v.* Garland, which had been decided since the case was directed to the King's Bench. The Vice-Chancellor held that that case was not an authority to be followed. It was, however, argued, 1. That the statute of Elizabeth only applied to purchasers under actual conveyances, and that equity ought not to interfere. It never could be contended, that at law a purchaser having a mere right of action under a contract, and not having paid his purchase money, could avoid a voluntary

(*z*) 17 July 1818, MS.; 3 Madd. 283, a short note; Sutton *v.* Chetwynd, 3 Mer. 249.

settlement,

settlement, and it would be difficult to draw any line. 2. That the agreement was a mere trick to set aside the settlement, without placing the purchaser in any danger. He never stood in the situation of a purchaser who could be deceived; and the second point in White *v.* Stringer was strongly relied upon (*a*). 3. That the creditors had not any right to file a bill. The settlement was binding on the settlor, and unless he placed a purchaser in a situation to avoid the settlement, the estate of the remainder-men could not be impeached after his death: there was no equity against them. 4. That Smith and Garland was a great authority, and a stronger case than that before the Court. There, as well as in this case, the purchaser submitted to perform the contract if a good title could be made. The Vice-Chancellor expressed an opinion that the creditors might file a bill although the settlor could not, as there was a moral obligation on him to provide for his debts, and that the Court could make a decree between the co-defendants. For the remainder-men it was insisted, that the settlor having solemnly on his marriage settled the estate, in default of his own issue, on the person who would succeed to his title, had already performed a moral obligation, and exhausted his power over the estate. The settlement was binding on him, and his creditors could not, claiming under him, have any rights to which he was not entitled. They did not attempt to impeach the settlement under the 13 Eliz. It was also submitted, that it would be an act of injustice to extend the rule as to decreeing relief between co-defendants to this case, because it at once took the estate from the remainder-men without any consideration. It did not follow that Watt the purchaser would file a bill; and if he did, the co-defendants might shape their defence in a way

(*a*) 2 Lev. 105.

which

which they had not by the present bill been called upon to do. The Vice-Chancellor held, that the statute of 27 Elizabeth did not confine the relief to a purchaser *by conveyance*, but the act supposed there may be a purchaser *by contract*. The purchaser's right follows as against the representatives of the vendor. His Honor thought that the creditors would have a right to insist upon a specific performance, though the vendor had not; but that point did not arise, for Mr. Watt says he is ready to take the estate if a good title can be made. Besides, the former decree concluded every question now raised. The defendants, the remainder-men, have appealed to the Lord Chancellor against this decision.

In Cormick *v.* Trapaud (*b*), the settlor was tenant in tail, with remainders to his brothers in tail, he agreed to settle the estate previously to his marriage, but did not extend the limitations to his brothers; he after marriage settled the estate with remainders to his brothers for life and their issue in strict settlement, and afterwards suffered a recovery. It was held that the limitations to the brothers were voluntary limitations, although the settlor was only tenant in tail.

If a trust be created by a voluntary settlement, the parties entitled under it may file a bill to have the trust carried into execution; but an injunction will not be granted restraining the settlor from defeating the settlement by a sale (*c*); nor will the pendency of the suit prevent the settlor from selling the property, or the purchaser from filing a bill, in order to enforce his rights under the contract (*d*).

(*b*) 6 Dow, 60.

(*c*) Pulvertoft *v.* Pulvertoft, 18 Ves. 84.

(*d*) Metcalfe *v.* Pulvertoft, 1 Ves. and Bea. 180. The widow pleaded *lis pendens*, and the plea was overruled by the Vice-Chancellor, on the 10th August 1813. See 2 Ves. and Bea. 200.

IV. It

IV. It remains to consider the construction which the part of the statute relating to conveyances with power of revocation has received. And first it is to be observed, that the statute does not extend to particular powers, as a power to charge 2,000 *l.* on an estate of considerable value, for such a power is not a power within the words of the statute (being for a particular sum) to revoke, determine, or alter the estate (*e*).

But it is of course quite clear, that a settlement by which a power of revocation, or a power tantamount to it, is reserved to the grantor, is void against a subsequent purchaser (*f*); and no artifice of the parties can protect the settlement. Therefore, although the power is conditional, that the settlor shall only revoke on payment of a trifling sum to a third person (*g*), or with the consent of any third person, who is merely appointed by the grantor (*h*), in these and the like cases the condition will be deemed colourable, and the settlement will be void against a subsequent purchaser.

But if a settlement is made with a power to the settlor to revoke, so as that the money be paid to trustees to be invested in the purchase of other estates (*i*), or to revoke with the consent of a stranger *bonâ fide* appointed by the parties, and his consent is made requisite, not as a mere colour, but for the benefit of all parties, the settlement will be valid, and cannot be impeached by a subsequent purchaser (*j*). This was determined in the case of Fuller *v.* Waterhouse (*k*), which, however, Mr. Powell thought,

(*e*) Jenkins *v.* Keymis, 1 Lev. 150.

(*f*) Cross *v.* Faustenditch, Cro. Jac. 180; Tarback *v.* Marbury, 2 Vern. 510. See Lane, 22.

(*g*) Griffin *v.* Stanhope, Cro. Jac. 454.

(*h*) See 3 Rep. 82, b.; Lavender *v.* Blackstone, 3 Keb. 496.

(*i*) Doe *v.* Martin, 4 Term Rep. 39.

(*j*) See Leigh *v.* Winter, 1 Ja. 411; and see Lane, 22.

(*k*) 2 Jo. 94; 3 Keb. 751; and see acc. Hungerford *v.* Earle, 2 Freem. 120; Lane, 22.

did

did not settle the point, *because all the claimants under the conveyance were purchasers for a valuable consideration* (*l*). But it seems quite immaterial whether the settlement itself is merely voluntary, or upon valuable consideration (*m*). The statute says, that all conveyances which the grantor has power to revoke, shall be void against subsequent purchasers; and therefore, if parties giving a valuable consideration for a settlement choose to permit the grantor to reserve a power to revoke the settlement, they must suffer for their folly. The grantor, by virtue of the power, *may* revoke the settlement; and if he sell the estate without revoking it, the statute makes it void. In fact, if we hold, that settlements made upon valuable consideration are not within this provision, we must at the same time admit, that the legislature did not intend to affect voluntary settlements, unless they were actually fraudulent; for voluntary settlements are void against purchasers under the second section of the act, which has already been discussed. This clause therefore would, under the construction put upon it by Mr. Powell, have scarcely any operation.

If a man having a power at a future day to revoke a settlement made by him, sell the estate before the day arrive, the settlement will be void against the purchaser at the time when the vendor, according to the terms of the power, *might* have revoked the settlement (*n*).

And a settlement made with power of revocation, will be void against a subsequent purchaser, although the grantor release or extinguish the power previously to the sale; otherwise the vendor might secretly release or destroy the power, and then show to the purchaser the con-

(*l*) Pow. on Powers, 330.
(*m*) See acc. Rob. on Vol. Conv. 637.
(*n*) Mo. 618; 3 Rep. 82, b.; Bridg. 23.

veyance containing the power of revocation, and so induce him to buy the land (*o*). In the case, however, in which this was decided, the settlement appears to have been voluntary, and the purchaser had not notice of the power being destroyed. But if a settlement should be made for valuable consideration, with a power of revocation, and the vendor should afterwards release the power for a valuable consideration, it is conceived that a purchaser, subsequently to the destruction of the power, could not prevail over the settlement, more especially if he had notice of the power being released.

The statute, as we have seen, operates conditionally, that is, where the first conveyance is not revoked according to the power. The act has no effect until the donee of the power sell the estate without revoking the first conveyance by virtue of his power. Suppose, then, a vendor professes to execute his power, but it is informally exercised, will the defect be cured by the statute? The legislature intended to protect purchasers against fraudulent settlements with powers of revocation, for it is essential to bring a case within the act, that the estate should be sold, and the first conveyance not be revoked according to the power reserved to the grantor by such *secret* conveyance. The non-execution of the power is the fraud which the statute intended to avoid. The conveyances against which the act was intended to operate were presumed to be secret. It was not meant to relieve any man who was aware of the existence of the power, and might have required it to be exercised. *The statute was not intended to operate as a mode of conveyance.* But without insisting that, where a purchaser is aware of the settlement, he must require the power to be executed, it may be urged, that where a purchaser does rest his title on the execution of the power, he

(*o*) Bullock *v.* Thorne, Mo. 615.

rejects

rejects the aid of the legislature, and takes his title *under* and *not in opposition to* the settlement; and can, therefore, only stand in the same situation as any other purchaser who has unfortunately taken an estate under a power defectively executed. The purchaser can scarcely be held to have a good legal title, unless the vendor not only attempted to execute the power, but actually conveyed the estate to him.

SECTION II.

Of Protection from Charitable Uses.

In the statute of charitable uses (*p*) is a proviso that no person who shall purchase or obtain, upon valuable consideration of money or land, any estate or interest of or in any lands, &c. that shall be given to any of the charitable uses mentioned in the statute, without fraud or covin, (*having no notice of the same charitable uses*), shall be impeached by any decrees of the commissioners therein mentioned.

A purchaser who hath bought for an inadequate consideration is not within this proviso; and the adequacy of the consideration is measured according to the rule of the civil law; but if one purchase lands under half the value, and sell to another upon good consideration *bonâ fide*, the fraud is purged (*q*).

If a rent-charge be granted out of land to a charitable use, and the land is afterwards sold for valuable consideration to one who has no notice, it has been said, the rent remains; because the purchase was of another thing that

(*p*) 43 Eliz. c. 4. (*q*) *Vide supra*, p. 241; Duke, 177.

was not given to the charitable use (*r*): but in Tothil (*s*) the same case is referred to as an authority, that a purchaser coming in without notice of a rent-charge shall not be chargeable therewith, although given to a charitable use. The correct distinction seems to be, that where the rent-charge is legal, it must, like every other *legal* incumbrance, bind the purchaser, although he purchased without notice; but that where it is a mere equitable charge, the commissioners shall not make any decree for payment of it against the purchaser, if he purchased without notice.

If the first purchaser gave a valuable consideration, and yet had notice, all that claim in privity under his estate and title, whether they have notice or not, will be bound by the decrees of the commissioners (*t*).

This rule, as we shall hereafter see, differs from the general rule of equity in this respect—a subsequent purchaser without notice not being affected by notice in the person of whom he purchased.

With this exception, however, the same rules seem to prevail in the construction of the act, with respect to notice, as are generally adopted by equity (*u*).

SECTION III.

Of Protection from Acts of Bankruptcy.

I. By the statute 13 Eliz. c. 7, a purchaser would be defeated, although there should be forty years after an act of bankruptcy, and before a commission; and although the purchaser had no notice; for the words of the statute

(*r*) East Greenstead's case, Duke, 64; and see Peacock *v.* Thewer, Duke, 82.

(*s*) Toth. 226.

(*t*) East Greenstead's case, Duke, 64; and see *ibid.* 173.

(*u*) *Ibid.*

are

are general *after bankruptcy*, and the proviso in the end of the statute makes it still plainer, viz. *That assurances made by a bankrupt before bankruptcy, and* bonâ fide, *shall not be defeated.*—This was hard doctrine against fair purchasers without notice; but so the law was (*x*).

With a view to prevent this injustice, and at the same time to preserve to creditors their just rights, and perhaps in analogy to the statute of fines, it was by the 21 Jac. I. c. 19, s. 14, enacted, that no purchase for good and valuable consideration should be impeached by virtue of that act, or any other act theretofore made against bankrupts, unless the commission to prove him a bankrupt should be sued forth against such bankrupt within five years after he should become a bankrupt.

But even since this provision it is always dangerous to purchase an estate from a trader; for an act of bankruptcy may have been committed within five years before, which will reach the estate (*y*).

It has been decided, that if a purchaser have notice of the act of bankruptcy, he is not a purchaser within the meaning of the statute, and consequently is not entitled to the benefit of it (*z*): but if the act of bankruptcy arise by the execution of a fraudulent deed, notice of the deed, without notice of the fraud, will not be deemed notice of the bankruptcy (*a*). This is a point which frequently occurs in practice; a deed appears upon an abstract, by which the owner, being subject to the bankrupt laws, conveys all his estate for the benefit of his creditors, and to which *all* the creditors are stated to be parties. Now, *supposing the title to be so circumstanced, that the purchaser could not be affected by an act of bankruptcy, unless he had*

(*x*) See For. 66, 67.
(*y*) See 4 Ves. jun. 398.
(*z*) Read v. Ward, 2 Eq. Ca. Abr. 119; 7 Vin. Abr. 119.
(*a*) S. C.

notice of it, the question at once arises, whether notice of the deed is notice of any creditor not having executed it, in which case the deed would be fraudulent, and an act of bankruptcy.—This is a very important question, as it is impossible to give evidence of *all* the creditors having executed. But it seems to follow from the decision in Read *v.* Ward, that the purchaser would not be held to have had notice, that *all* the creditors were not parties to the deed; and this opinion appears to be adopted in practice.

To avoid a purchase, the act of bankruptcy must be committed within five years before the commission (*b*). The five years are, however, computed from the last act of bankruptcy preceding the sale; for the words of the statute are not after he shall first be a bankrupt, but only after becoming bankrupt generally (*c*): and, therefore, if after several acts of bankruptcy an estate is sold by the bankrupt, and a commission issues within five years from the last act, the sale will be avoided (*d*). But no act of bankruptcy *after* the sale will affect the purchaser; and consequently his title will not be impeached by any commission issued after five years from the act of bankruptcy immediately preceding the sale (*e*).

II. Thus the law stood until the last act for amending the laws relating to bankrupts (*f*), by which, after reciting that great inconveniences and injustice had been occasioned by reason of the fair and honest dealings, and transactions

(*b*) Radford *v.* Bloodworth, 1 Lev. 13.

(*c*) Spencer *v.* Venacre, 1 Keb. 722; 1 Lev. 14.

(*d*) Jelliff *v.* Horn, 1 Keb. 12, cited; Radford *v.* Bloodworth, 1 Lev. 13; 1 Keb. 11.

(*e*) Spencer *v.* Venacre, 1 Keb. 722; and see Cullen's B. L. 241.

(*f*) Romilly's Act, 46 Geo. III. c. 135, extended to executions and attachments by 49 Geo. III. c. 121, s. 2.

of,

of and with traders being defeated by *secret* acts of bankruptcy, in cases not already provided for, or not sufficiently provided for by law, it was enacted, that in all cases of commissions *thereafter* to be issued, all conveyances by, all payments by and to, and all contracts and other dealings and transactions by and with, any bankrupt *bonâ fide* made or entered into more than two calendar months before the date of such commission, should, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual to all intents and purposes whatsoever, in like manner as if no such prior act of bankruptcy had been committed, provided the person or persons so dealing with such bankrupt had not at the time of such conveyance, payment, contract, dealing or transaction, any notice of any *prior* act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment. And it is provided, that the issuing of a commission of bankruptcy against such bankrupt, although such commission shall afterwards be superseded, or the striking of a docket for the purpose of issuing a commission against such bankrupt, whether any commission shall have actually issued thereupon or not, shall be deemed notice of a prior act of bankruptcy for the purposes of the act; if it shall appear that an act of bankruptcy had been actually committed at the time of the issuing such commission, or striking such docket.

The better opinion appears to be, that neither an act of bankruptcy, nor a commission of bankruptcy, is of itself notice to a purchaser; and that notwithstanding the statute of James, a purchaser who has got in a prior legal estate without notice of a commission or act of bankruptcy, may protect himself against it (*g*). But, under the late statute, a purchaser cannot avail himself of a prior legal

(*g*) See this considered, *infra*, Ch. 17.

estate if a commission was actually issued or a docket struck previously to his purchase, although he had not actual notice of the issuing of the commission or striking of the docket, because the statute expressly makes those acts constructive notice.

It should seem, however, that the provision in the statute of James, in favour of purchasers, is not repealed by the late act. If it be not, then a purchaser will not be bound by the constructive notice established by the late act, where he does not claim the benefit of it. Thus, if it should appear, that a commission had been issued or a docket struck prior to the purchase, the purchaser could not claim the benefit of the late act, although he had not actual notice of the commission or docket; but if more than five years had elapsed since the purchase, and a new commission were then to issue, it should seem that he may insist upon the benefit of the act of James. So where a purchaser *bonâ fide*, and without notice, has a prior legal estate, he may, notwithstanding either of the acts, make use of it as a protection against the assignees. The grounds of this opinion upon the late act are, that it was passed in favour of purchasers, that it does not say *affirmatively*, that a commission issued two months after a conveyance *shall* bind where a commission has been issued or a docket struck prior to the purchase, but merely enacts *negatively*, that a commission issued after that time *shall not* bind, unless a commission was issued or a docket struck before the purchase.

The express enactment, that the striking a docket or issuing a commission shall operate as a constructive notice to purchasers, seems to exclude all other kinds of constructive notice, so far as any aid is sought from this statute: the legislature having expressly declared, that these two particular acts shall be deemed constructive notice, it must

be

be inferred that they intended no other act should have that effect. Therefore there is ground to contend, that if a commission has not been issued or a docket struck, a purchaser may avail himself of the statute, although, for instance, his solicitor had express notice that the vendor had committed an act of bankruptcy. Against this construction it might, perhaps, be argued, that as neither the striking of a docket, nor the issuing of a commission, was prior to the statute of itself notice to a purchaser, the intention must have been to make those acts constructive notice, in addition to the acts which equity already deemed tantamount to actual notice. Cases of actual notice will entirely deprive the purchaser of the benefit of the act.

The provision which makes the striking of a docket notice, in all events, was not approved of (*h*). It was not originally in the act, and has since been repealed (*i*).

It is, as we have seen, also provided, that to claim the benefit of the act, the purchaser must not have notice that the bankrupt was insolvent, *or* had stopped payment. If it should be thought that insolvency and stopping payment do not mean the same thing, considerable difficulty must frequently arise on this provision. Insolvency of itself appears to include not merely a stoppage of payment, but an *inability* to pay; unless, however, the evidence of insolvency be confined to an actual stoppage, it would not be easy to say what shall be deemed notice of it.

Since the above observations were written, it has been decided, that the insolvency, mentioned in the statute, means *a general inability* in the bankrupt to answer his engagements (*k*).

In a late case (*l*) Mr. Justice Le Blanc said, that he took insolvency, as it respects a trader, to mean that he is not

(*h*) Rex v. Bullock, 1 Taunt. 71; 14 Ves. jun. 452.

(*i*) 49 Geo. III. c. 121.

(*k*) Anon. 1 Camp. Ca. 491, n.

(*l*) Bayly v. Schofield, 1 Mau. and Selw. 338.

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in a situation to make his payments as usual, and that it does not follow that he *is not* insolvent because he may ultimately have a *surplus upon the winding* up of his affairs; and *Mr. Justice Bayley agreed, that* insolvency means that a trader is not able to keep *his general* days of payment, and that he is not to be considered as solvent, because possibly his affairs may come round.

The provision, that the *issuing* of a commission shall be notice, although such commission shall afterwards be superseded, extends even to a commission which has been superseded, without being opened, although it was contended, that the legislature must have meant a commission opened, and acted upon, though afterwards superseded (*m*).

SECTION IV.

Of Protection from Judgments and Recognizances.

I. By a fiction in law, all judgments were supposed to be judgments of the first day of the term in which they were obtained; and therefore a purchaser might have his estate incumbered by a judgment acknowledged subsequently to his purchase (*n*).

To obviate this injustice it was enacted (*o*), that any judge, or officer of any of his Majesty's Courts of Westminster, that should sign any judgments, should, at the signing of the same, set down the day of the month and year of his so doing, upon the paper book, docket or record, which he should sign; which day of the month

(*m*) Watkins v. Maund, 3 Camp. Ca. 308.

(*n*) *Vide supra*, p. 457, as to judgments.

(*o*) 29 Car. II. c. 3, s. 14, 15.

and

and year should also be entered on the margin of the roll of the record where the said judgment should be entered, and such judgments, as against purchasers *bonâ fide* for valuable considerations of lands, tenements or hereditaments, to be charged thereby, should in consideration of law be judgments only from such time as they should be so signed, and should not relate to the first day of the term whereof they were entered, or the day of the return of the original, or filing the bail. And this provision has been since extended to the Courts of Great Session in Wales, and to the Courts of Session in the counties palatine of Chester, Lancaster and Durham (*p*).

But though this settled all differences respecting the fiction of law, whereby judgments were supposed to be all of the first day of the term, by compelling the party to set down the particular period when the judgment was signed, and declaring that, as against purchasers *bonâ fide* for a valuable consideration, the lands, tenements and hereditaments to be charged thereby, should be charged only from such time as the judgment was signed: yet, inasmuch as it did not compel the plaintiff to carry in the judgment roll, purchasers and others were rendered almost incapable of discovering what judgments were recovered (*q*).

And, therefore, by another statute (*r*) it was enacted, that the clerk of the essoigns of the Court of C. B. the clerk of the doggets of the Court B. R. and the master of the office of pleas in the Court of Exchequer, should make and put into an alphabetical dogget, by the defendants names, of all the judgments entered in their respective Courts of Michaelmas and Hilary terms, before the last

(*p*) 8 Geo. I. c. 25, s. 6.

(*q*) Robinson v. Harrington, 1 Pow. Mort. 518, 4th edit. S. C. MS.

(*r*) 4 and 5 W. and M. c. 20, made perpetual by 7 and 8 W. III. c. 36, s. 3.

day

day of the ensuing terms; and of the judgments of Easter and Trinity terms, before the last day of Michaelmas term; and that no judgments should affect lands or tenements as to *bonâ fide* purchasers for valuable consideration, unless docketed and entered according to the act; and it is directed that every dogget shall be put into and kept in books in parchment, to be searched by all persons, at reasonable times, paying four-pence for searching every term.

"Dockets or indexes to judgments were in use long before this statute. They were invented by the Courts for their own ease, and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large. The statute of William and Mary did not supersede the former practice of docketing the judgment in parchment or paper, which is still necessary to be done by the attornies, on entering and bringing in the rolls; but was intended to operate in addition to that practice, by requiring the dockets to be entered in alphabetical order by the officers of the Court (*s*)."

Now, upon the provisions of this act it is to be observed, that judgments cannot be docketed after the time mentioned in the act; and the practice of the clerks in docketing them after that time, is only an abuse for the sake of their fees, and ineffectual to the party (*t*). And as the object of the act is to enable purchasers to discover judgments by the names of the persons against whom they are entered, if the name of a defendant be falsely entered, as Compton for Crompton, the judgment will be void against purchasers, and the Court will not amend the record (*u*).

If it is wished to enter a judgment as of a term, it must be actually entered before the essoign day of the succeed-

(*s*) Tidd's Pract. 858. 860. 3d edit.; Gilb. C. P. 140.

(*t*) *Per* Master of the Rolls, in Forshall *v.* Coles, Appendix, No. 19.

(*u*) Sale *v.* Crompton, 1 Wils. 61; 2 Str. 1209.

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ing term; and Lord C. J. Holt has said, that if judgment be signed in a term, and in the subsequent vacation the defendant sells lands, and before the essoigns of the next term the plaintiff enter his judgment, it shall affect the lands in the hands of the purchaser *(w)*. And although this has been doubted (*x*), yet it seems to be correct, as the judgment is not affected by the act of Charles II. or that of William and Mary. The judgment binds only according to the letter of the statute of Charles; and it is not required to be docketed by the act of William and Mary, till before the last day of the subsequent term. And there is no inconvenience in this rule, for I find, upon inquiry, that the practice is to index judgments as soon as they are signed, in order to enable purchasers to search for them with facility. But this practice is wholly independent of the directions of the act by which judgments are required to be docketed.

Although a judgment is not duly docketed, and therefore void against a purchaser, yet if the purchaser has notice of it, and did not pay the value of the estate, it will be presumed that he agreed to pay off the judgment, and equity will compel him to pay it (*y*).

The general rule of equity would warrant an assertion, that the case would be the same although no agreement were made. In the case of Forshall *v.* Coles (*z*), however, it appears that the Master of the Rolls held decidedly, that notice of a judgment not docketed was not material. But this decision cannot be relied on: the effect of it would be to overrule all the decisions on the

(*w*) Hodges v. Templar, 6 Mod. 191.

(*x*) Tidd's Pract. 857; Bac. Abr. by Gwill. tit. Execution (I) n.

(*y*) Thomas v. Pledwell, 7 Vin. Abr. 53, pl. 5; 2 Eq. Ca. Abr. 684, pl. 7.

(*z*) 7 Vin. Abr. 54, pl. 6; 2 Eq. Ca. Abr. 592, pl. 8; S. C. MS. a better note, Appendix, No. 19.

statutes

statutes for registry (*a*). They were passed for precisely the same purpose as the act of William and Mary, viz. to enable purchasers readily to discover incumbrances; and therefore, if a purchaser has notice of any judgment, the statute does not in equity extend to him, as he is already in possession of what the legislature intended to furnish him with. This point, upon which a considerable difference of opinion recently prevailed in the profession, has lately been decided by Lord Eldon in favour of the judgment creditor. The case of Forshall *v.* Coles is therefore overruled (*b*).

The statute of 21 Jac. I. (*c*), for the better division of the estates of bankrupts, enacts, that all creditors by judgment, whereof execution is not served and executed before the bankruptcy, shall only come in rateably with the other creditors. In general, therefore, judgments against a bankrupt are not material where the estate is sold by his assignees. In a late case (*d*), a man sold a freehold estate, and the conveyance was executed by all the material parties; but no part of the money was paid, and the conveyance remained in the seller's hands. In this stage he became a bankrupt, and a commission issued against him; and it appeared that judgments were entered up against him previous to the bankruptcy. The purchaser required satisfaction to be entered up on the judgments. This was resisted on the ground that, by the statute of James I. the judgment debts were reduced to a level with the simple contract debts, for the object of that statute was, to put all the creditors on an equality (*e*). Now, it was

(*a*) *Vide infra*, sect. 5.

(*b*) Davis *v.* Earl of Strathmore, 16 Ves. jun. 419.

(*c*) Ch. 19, s. 9.

(*d*) Sloper *v.* Fish, Rolls, 29th July 1813; 2 Ves. and Bea. 146.

(*e*) See Newland *v.* ——, 1 P. Wms. 92.

clear

clear that the seller had an equitable lien on the land for its whole value, and that the money would go to the assignees; and, consequently, if the judgment creditors could execute their judgments against the purchaser, they would obtain a preference over the other creditors; for, of course, the purchaser was not to pay his money, and also be liable to the judgments. The case of Orlebar v. Fletcher *(f)*, appeared to be a stronger case against the judgment creditors than the present, for there the purchaser had paid the greater part of the purchase money before the bankruptcy; and although, in the present case, the conveyance was executed, yet it was not delivered, and therefore might be considered as an escrow *(g)*; and even if it operated to vest the legal estate in the purchaser, yet the case was within the spirit and meaning of the act of James; because the estate in effect formed part of the property to be distributed. Upon these grounds, the assignees filed a bill against the purchaser, for a specific performance; but the Master of the Rolls thought the title too doubtful to enable him to force it on the purchaser.

In a later case, however (*h*), where a man agreed to sell his estate, and became a bankrupt before the conveyance was executed, the same learned judge held that the assignees of the seller could make a title without the concurrence of judgment creditors whose judgments were duly docketed before the bankruptcy.

The 21 Jac. I. c. 24, which enables persons to have new execution against the property of debtors dying in

(*f*) 1 P. Wms. 737.

(*g*) Derby Canal Company v. Wilmot, 9 East, 360. See O'Dell v. Wake, 3 Camp. 394, where the deed was in the possession of the purchaser's solicitor.

(*h*) Sharpe v. Rankin, 2 Russ. 102.

execution,

execution, provides, that the act shall not extend to give liberty to any person or persons, their executors or administrators, at whose suit or suits any such party shall be in execution, and die in execution, to have or take any new execution against any the lands, tenements or hereditaments of such party dying in execution, which shall at any time after the said judgment or judgments be by him sold *bonâ fide* for the payment of any of his creditors, and the money which shall be paid for the lands so sold either paid or secured to be paid to any of his creditors, with their privity and consent, in discharge of his or their due debts, or of some part thereof.

II. Formerly, if goods had been sold during long protection, a *fieri facias* tested the preceding term would have overreached the sale, although issued subsequently to it(i).

To remedy this inconvenience, it was enacted (k), that no writ of *fieri facias*, or other writ of execution, should bind the property of *goods* against whom such writ of execution was sued forth, but from the time that such writ should be delivered to the sheriff, under-sheriff or coroner to be executed; and for the better manifestation of the said time, the sheriff, under-sheriff and coroners, their deputies and agents, should upon the receipt of any such writ, without fee for doing the same, indorse upon the back thereof the day of the month or year whereon he or they received the same (I).

(i) Houghton v. Rushley, Skin. 218. 257; and see Comb. 145; 2 Ventr.

(k) 29 Car. II. c. 3, s. 16.

(I) This statute only operates in favour of purchasers. It was not passed for the benefit of the debtor. Houghton v. Rushley, supra. Norden v. Needham, Pasch. 3 W. and M. B. R. MS. In this last case it was held, that deeds and writings could not be taken in execution.

It

It has been said (*l*), that the whole intention of this provision was to secure purchasers, under a second execution, against any former writ which might have been delivered to the sheriff. But a purchaser under a second execution was always protected against any prior writ of which he had no notice, by the rule of law, independently of the statute of frauds (*m*); and the reason already given appears to be the correct one.

It has been doubted whether the word "goods," in the act referred to, extends to leasehold estates; and it appears by two opinions published in Mr. Rigge's Observations on Registry, that Mr. Serjeant Hill thought it did not include leaseholds, but that they might be extended on a writ of *elegit*; and consequently were bound from the time the judgment was duly entered and docketed; and that, on the other hand, Mr. Butler thought the word "goods" did comprise leaseholds, which therefore were not bound until delivery to the sheriff of the writ of execution.

It must be admitted, that a leasehold for years may be extended on an *elegit*, if it is in the possession of the defendant at the time execution is awarded (*n*). It was, however, settled long before the statute of Charles II. that a sale of chattels was good after judgment, although not after execution awarded (*o*); so that it is evident, that as to a term of years the command to the sheriff in an

(*l*) *Per* Ashhurst, J. *in casu* Hutchinson v. Johnson, 1 Term Rep. 729.

(*m*) See Smallcomb v. Buckingham, 1 Lord Raym. 251; Carth. 290; Payne v. Drewe, 4 East, 523.

(*n*) Sir Gerard Fleetwood's case, 8 Co. 171; and see and consider 31 Ass. p. 6; 38 Ass. p. 4; and see 2 Inst. 395; Gilb. Ex. 33. 35. The author fell into an error in this respect in the first edition.

(*o*) Sir Gerard Fleetwood's case, 8 Co. 171; and see 1 Fitz. Abr. tit. Execution, pl. 108; 2 Ro. Abr. 157; Wilson v. Wormol, Godb. 161, pl. 226; Shirley v. Watts, 3 Atk. 200.

elegit does not overreach the sale in the same manner as it does in the case of a freehold estate. This distinction appears to have been expressly taken in Fleetwood's case.

With respect to judgments, the statute of frauds hath two branches: the one relating to judgments against real estate; the other relating to executions on judgments against goods or personal estate. The act being a remedial one, the mode of discovering whether leaseholds are bound by the last provision, seems to be, first, an inquiry whether purchasers of leaseholds were within the mischief the legislature intended to guard against; and if they were, then an inquiry whether the word "goods" is sufficiently comprehensive to effectuate the intention of the act.

First then, the act was passed for the quiet and in favour of purchasers; and admitting that leaseholds were only bound from the award of execution, it is evident that the first provision in the act does not apply to leaseholds; which are, therefore, clearly within the mischief intended to be guarded against by the second provision, as a sale of them is liable to be overturned by a writ awarded in vacation, and tested in the preceding term; and if we do not hold leaseholds to be within the operation of this branch of the act, the consequence is, that purchasers of them are still obnoxious to the danger which the statute intended to guard them against.

Assuming that leaseholds are within the meaning, it remains to inquire, whether they are within the words of the act. This depends upon the construction which the word "goods," as used in the act, ought to receive.

Biens, bona, Sir Edward Coke says (*p*), includes all chattels, as well real as personal. *Chattels*, he adds, is a

(*p*) Co. Litt. 118, b.

French

French word, and signifies goods, which by a word of art we call *catalla*. And this, as Sir Wm. Blackstone observes (*q*), is true if understood of the Norman dialect, for in the *Grand Coustumier* (*r*), we find the word *chattels* used and set in opposition to a fief or feud, so that not only goods, but whatever was not a feud, were accounted chattels; and the learned commentator is of opinion that our law adopts it in the same large, extended, negative sense.

This opinion appears to be correct, if confined to the word *chattels*; but it must not be extended to the word *goods*, which, in our law, certainly has a more confined operation.

By the civil law, however, *bona* includes all chattels, as well personal as real; and therefore a general bequest of all one's goods will pass a leasehold estate (*s*), because the civil law guides the construction of bequests of personalty; but it seems clear, that in an assignment, which must be construed according to the rules of the common law, a leasehold estate will not pass under the word *goods* (I).

It is evident, therefore, that in some cases that word will include leaseholds, while in others it will not; and the

(*q*) 2 Comm. 385, 7th edit.
(*r*) C. 87.
(*s*) Portman *v.* Willis, Cro. Eliz. 386.

(I) This was decided in 4 Ed. VI.; but in Portman *v.* Willis, *ubi sup.* Gawdy was of opinion, against Popham and Clench, that a grant of *omnia bona mobilia et immobilia*, would pass leases for years; and so, he said, would a grant of *omnia bona* in general; for 39 H. VI. 35, was, that a man had rent for years, and granted *omnia bona sua*; and it was held that this rent passed; and he vouched 4 Hen. IV. as another authority, because an executor shall have an *ejectione firmæ* by the equity of the statute of 4 Ed. III. *de bonis asportatis*.

On examination, it appears, that the authorities cited by Gawdy do not apply. The grant was of *omnia bona et catalla, tam viva quam mortua*; and in the statute of 4 Edw. III. the words *biens et chateux* are used.

true rule to discover what sense was affixed to it in the statute of frauds seems to be, an investigation of the meaning usually attached to the same word in acts of parliament passed before that statute.

By the statute of West. 2, (*t*), it is enacted, that where, upon the death of any person intestate and indebted, the *goods* (*bona*) shall come to the ordinary, he shall be bound to pay the debts so far as the *goods* (*bona*) will extend, in the like manner as executors would have been if he had left a will. And in the 31st Edw. III. (*u*), for the commitment of administration, the word *goods* (*biens*) only is used.

In both these statutes, therefore, the word *goods* was considered as denoting personalty in general. It may indeed be objected, that terms for years were not then much in use; but allowing this, later acts place the point still more out of doubt.

Thus the 21st Hen. VIII. c. 5, after directing how administration shall be granted in certain cases of the "goods" of intestates, contains a direction, that surety shall be taken of the administrators for the administration of the "goods, chattels and debts," which they should be authorised to minister (*x*).

In this statute, then, the word "goods" was used as synonymous to "goods, chattels and debts:" and the point seems to be placed beyond controversy by the same sense being attached to that word in a statute passed but a few years previously to that upon which the present question arises.

The statute to which I allude is the 22d and 23d Car. II. c. 10, which, after giving power to commit administration of the "goods" of intestates, directs bonds to be taken,

(*t*) 13 Ed. I. c. 19.
(*u*) Stat. I. c. 11.
(*x*) And see 43 Eliz. c. 8.

with

with a condition for (amongst other things) making an inventory of the "goods, chattels and credits" of the deceased; which words are used throughout the condition. In fact, the words "goods," "goods, chattels and credits," and "estate," have one and the same meaning attached to them throughout the statute (*y*).

As this point is of very great importance in practice, and the opinion of so great an authority as Serjeant Hill would perpetually lead to disputes on this subject, it is hoped this minute (and I fear tedious) investigation will not be unacceptable to the learned reader.

It remains to remark, that Lord Hardwicke seems to have considered leaseholds as within the operation of the 16th section of the statute of frauds, and consequently as not bound until the delivery of the writ of execution to the sheriff.

For in Burdon *v.* Kennedy (*z*), his Lordship said, where an execution by *elegit*, or *fieri facias*, is lodged in a sheriff's hands, it binds goods from that time, except in the case of the crown, *and a leasehold estate is also affected from that time*; and if the debtor, subsequent to this, makes an assignment of the leasehold estate, the judgment creditor need not bring a suit in ejectment to come at the leasehold estate, by setting aside the assignment, but may proceed at law to sell the term, and the vendee, who is generally a friend to the plaintiff, will be entitled at law to the possession, notwithstanding such assignment (*l*).

(*y*) And see 29 Car. II. c. 3, s. 25.

(*z*) 3 Atk. 739; and see Jeanes v. Wilkins, 1 Ves. 195; Forth v. Duke of Norfolk, 4 Madd. 503.

(*l*) Note, if the judgment creditor tamper with the sheriff to have the estate sold at an undervalue, equity will relieve against the sale. Gascoign v. Stut, 3 Cha. Rep. 32. See Dillon v. Byrn, Irish Term Rep. 600.

III. There is still another pro
Charles II. in favour of purchaser
the day of the month and year of
zances shall be set down in the m
that no recognizance shall bind
hands of any purchaser, *bonâ fide*
sideration, but from the time of su

SECTION V.

Of Protection from unregist

By several acts of parliament, a
cerning estates within the north (*b*
ridings of the county of York; o
county of Kingston upon Hull (*e*);
Middlesex (*f*), are directed to be

And it is enacted, that all such d
fraudulent and void against any sul
mortgagee, for valuable considerat
thereof be registered in the mann
before the registering of the memo
which such subsequent purchase
claim.

And that all devises by will sha
lent and void against subsequent
gees, unless a memorial of such wi
the space of six months after the d

(*a*) 29 Cha. II. c. 3, s. 18. c. 18.
(*b*) 8 Geo. II. c. 6. (*e*)
(*c*) 6 Anne, c. 35. (*f*)
(*d*) 2 and 3 Anne, c. 4; 5 Anne,

testatrix, dying within Great Britain; or within the space of three years after his or her death, dying upon the sea, or in parts beyond the seas. Wills registered within the time allowed by the act, will prevail over even a prior registered conveyance; but no time is limited by the act within which a memorial of a will must be registered. It may therefore be done at any time where there is no adverse title under a prior registered conveyance; and there is no weight in an objection which has lately been made, that the estate descends to the heir at law, if the will be not registered within the periods above specified.

This provision is the same in all the acts, but different provisions are made by the several acts in the case of wills contested or suppressed.

If the devisee of an estate within any of the three ridings of the county of York, or the town of Kingston upon Hull, be disabled to exhibit a memorial within the time limited, by the suppression of the will, or other inevitable difficulty, then a memorial entered of such impediment within six months after the death of such devisor or testatrix, who shall die within Great Britain, or within three years after the decease of such person who shall die upon the sea, or beyond the seas; and a memorial of such will, also registered within six months after the removal of such impediment, will protect the devisees against any purchaser subsequently to the will.

But as to the estates in the north riding of York, it is enacted, that in case of the concealment or suppression of any will or devise, any purchaser shall not be disturbed or defeated in his purchase, unless the will be actually registered within three years after the death of the devisor.

As to estates in the county of Middlesex, it is provided, that an entry of the impediment within two years after

the death of any devisor or testatrix who shall die in Great Britain, or within four years after the decease of such person who shall die upon the sea or beyond the seas; and the registry of a memorial of the will within six months after the removal of the impediment, shall be good. But no concealed will is to affect a purchaser, unless it be registered within five years after the death of the testator.

None of the acts extend to copyhold estates, or to leases at rack-rents, or not exceeding twenty-one years, where the actual possession and occupation go along with the lease. And the act for the county of Middlesex does not extend to any of the chambers in Serjeant's Inn, the Inns of Court, or Inns of Chancery.

And it is by the same acts further provided, that no judgment, statute or recognizance (other than such as shall be entered into in the name and upon the proper account of the king, his heirs and successors) shall bind any such estates as aforesaid, but only from the time that a memorial thereof shall be duly entered.

This clause is general as to estates in Middlesex; but as to estates in the east and west ridings of York and Kingston upon Hull, it is enacted, that the registry of judgments, statutes or recognizances within thirty days after the acknowledging or signing thereof, shall bind all the lands of the defendant at the time of such acknowledgment or signing; and the same provision is made as to estates in the north riding of York, only that the time is limited to twenty days.

In commenting on these important acts, I propose to consider, first, the memorial required by the acts; secondly, what instruments must be registered; thirdly, the exceptions in the acts; and fourthly, the equitable doctrine on these statutes in regard to notice.

I. And

I. And first, every memorial of a deed or conveyance is directed by the acts to be under the hand and seal of some or one of the grantors or grantees, his or their heirs, executors or administrators, guardians or trustees, attested by two witnesses, *one whereof to be one of the witnesses to the execution of the deed*; which witness shall, upon his oath before the register, prove the signing and sealing of the memorial, *and the execution of the deed mentioned in such memorial.*

A line is by mistake omitted in the act for the north riding of York; the memorial is required to be attested "by two witnesses to the execution of such deed, which witness" is directed to prove the execution of the memorial and the deed. It is evident, that the words in the other acts "one whereof to be one of the witnesses" are omitted after the word "witnesses," and before the words "to the execution of such deed." By this act the person signing the memorial may acknowledge it, and the execution of the deed.

The intention of the legislature clearly was, that no deed should be memorialized, the execution of which by the *granting party* was not proved on oath by one of the witnesses to it; for although the memorial may be executed either by the grantor or grantee, yet one of the witnesses to it must be a witness to the *execution of the deed*, and this must be understood to mean not merely the execution by an unnecessary party, as the grantee, but the execution by the party from whom the estate moves.

It is however observed, in the Observations on Registry (*g*), that if a considerable time has elapsed from the date of a deed intended to be registered, and all the witnesses are dead, or the testimony of any of them not easily obtained, no further delay need originate from either

(*g*) Rigge on Reg. p. 76, n. (d); Precedent, No. 32, p. 143.

cause,

cause, *as the re-execution of such deed by any one of the parties in the presence of a new witness*, will be sufficient to effectuate the registry.

Now there seems great reason to contend, that such a memorial would be wholly inoperative under the registering acts. A witness to the execution of a deed, which is intended to be registered, was required for the purpose of authenticating the original execution of it, and to prevent forged deeds from being put on the register (*h*). The requisition of the act is not even substantially complied with by an execution, which is totally inoperative, and which, if it had any operation, would be a fraud upon the revenue.

It seems that the direction in the act, by which the heirs, executors or administrators, guardians or trustees of some or one of the grantors or grantees, are authorised to execute the memorial, has been thought not to convey a very clear idea of the manner in which the registry by such representative is to be effected; and therefore the register requires the instrument to be registered, to be sealed and delivered by the person requiring the registry, as if he was a party in his own right (*i*).

But it seems quite clear, that no such execution is necessary. The representative need execute the memorial *only* in the presence of two witnesses, "one whereof to be one of the witnesses to the execution of such deed or conveyance," which witness will then, according to the very words of the act, prove the signing and sealing of the memorial, and the execution of the deed or conveyance mentioned in such memorial.

So it seems, that where a lease or any other deed is from a corporation, who of course affix merely a seal

(*h*) See Hobhouse v. Hamilton, 1 Scho. and Lef. 207.

(*i*) Rigge, 74, n. (b); Precedent, No. 31, p. 142.

without

without any signature, the lessee is required to execute the deed for the conveniency of registry (*k*).

This practice is open to the observation just made; for it is clear, upon principle as well as authority (*l*), that a corporation affixing their seal is tantamount to a *signing* and sealing by an individual. And it is to be observed, that in this and the preceding cases, it is indispensably requisite that one of the witnesses to the original execution of the instrument intended to be memorialized, should be a witness to the memorial.

It appears also, that the registers are in the habit of receiving and registering certificates of writs of execution (*m*), decrees or orders from the courts of equity, or rules of the courts of law (*n*), office copies of wills (*o*), and certificates of the discharge of judgments (*p*), none of which are authorized to be registered, or can be legally received. And it therefore seems clear, that the registry of such instruments is wholly nugatory, so far as any priority or effect is attempted to be given to them by force of the act.

So wills and probates, and copies of wills officially authenticated, which have not been registered within the period directed by the statute, are received at the office, and it is thought would operate against persons purchasing subsequent to the registry, notwithstanding the non-existence of any decree or order to warrant the delay (*q*). But the same observation applies to this practice as was made by the Master of the Rolls in Forshall *v.* Coles, on docketing judgments after the time appointed by the act of William and Mary (*r*); it is only an abuse for the sake of fees, and ineffectual to the parties.

(*k*) Rigge, 106, 107.

(*l*) Doe *v.* Hogg, 1 New Rep. 306.

(*m*) Rigge, Precedent 35, p. 148.

(*n*) *Id.* 83, n. (h).

(*o*) *Id.* 96, n. (s).

(*p*) *Id.* 87, n.

(*q*) *Id.* 84, n.

(*r*) *Vide supra.*

In

search for incumbrances on the estate; but no good reason can be given why the parties should be put to expense by stating the instrument more fully. When a purchaser discovers what deeds were executed, he will of course require the production of them; and so no mischief can arise by a strict adherence to the letter of the act.

With respect to the parcels it is provided, that where there are more writings than one for making or perfecting any conveyance or security which concerns the same estates, it shall be a sufficient memorial thereof, if all the estates are only once named in the memorial of *any one* of the deeds or writings, and the dates of the rest of the deeds or writings, with the names and additions of the parties and witnesses, and the places of their abodes, are only set down in the memorials of the same, with a reference to the deed or writing whereof the memorial is so registered, that contains the parcels mentioned in all the deeds, and directions how to find the registering of the same (*t*).

This provision has been extended in practice. It is usual, for instance, in a memorial of an assignment of a lease, to refer for the parcels to the prior registry of the lease, although a separate and distinct transaction. This, however, is very incorrect. The statute only authorizes such a reference where several writings are executed to perfect the *same* conveyance or security. And where the memorial does not comply with the directions of the act, the person claiming under the deed defectively registered cannot insist on the benefit of the statute against a subsequent purchaser, without notice, whose conveyance is duly registered.

II. We are to consider what deeds ought to be registered. It is not easy to conceive that any doubt could

(*t*) 7 Anne, c. 20, s. 7.

arise

arise on this head; but, nevertheless, two questions have been agitated.

First, it has been contended, that a deed of appointment under a power need not be registered; because upon the execution of a power, the interest limited by it arises under the deed creating the power. But to this it was answered, that the deed was within the mischief intended to be guarded against by the act, as a purchaser could not otherwise discover whether the power was exercised; and it was accordingly decreed, that deeds of appointment must be registered (*u*).

The other question was, whether the non-registry of a lease was cured by registering an assignment in which the lease was recited; and it was very properly decided, that it was not (*x*); for the intention of the legislature was, that the register should contain such information as might enable purchasers to ascertain whether estates were or were not subject to incumbrances; for which purpose it is necessary, that the register should contain a regular chain of title. If one link is broken, the object of the legislature is defeated.

III. We come to the exceptions in the acts.

The first exception is of copyhold estates. This exception is very general; and it may be thought that no deed relating to a copyhold estate need be registered. No effectual lien can be created on the land without its appearing on the court rolls. A lease, indeed, once created by license is a common law interest, and may be assigned without the assignment appearing in the court books; but this is a very inconsiderable mischief, as the license must appear on the court rolls. Indeed, in some

(*u*) Scrafton *v.* Quincey, 2 Ves. 413.

(*x*) Honeycomb *v.* Waldron, 2 Str. 1064.

few

few manors, copyhold tenants may lease without license, and this is a good custom. But still in all cases, although the interest granted by the lease is a common law interest, yet the *estate* remains copyhold, and appears to be within the exception in the act. However, it is certainly advisable to register such leases of copyhold estates as, if the estate were freehold, would require registry.

The next exception is of leases at rack-rent. It frequently happens, that a lease originally at rack-rent becomes of some value in the course of a few years. When the lease is sold for a valuable consideration, the question arises, whether the lease continues within the exception, or ought to be registered (*y*). On one side it may be urged, that the property being valuable, is within the spirit of the statutes, as a purchaser of it might otherwise be defeated by a prior secret assignment. But, on the other hand, it may be said, that the next exception shows the legislature did not intend every species of property to be subject to the acts, although it may be a saleable interest. And it may be insisted, that the lease, at the time it was granted, having been within the exception, cannot be affected by any matter *ex post facto*, for then one day it may be within the exception, and another it may be subject to the directions of the act, just as the property may rise or fall in value. Perhaps, therefore, the better opinion is, that a lease originally at rack-rent, and within the exception in the acts, continues so during the term, although it may become a valuable and saleable interest.

The next exception is of leases not exceeding twenty-one years, where the actual possession and occupation go along with the lease, And it has been said, that where such a lease becomes assigned for a valuable considera-

(*y*) See Rigge, 88, n. (n).

tion,

IV. The fourth division of this subject remains to be discussed. The questions on this head are simply three, viz.

First, Whether a person having the legal estate, as a mortgagee, and advancing more money without notice of a second mortgage duly registered, shall hold against the second mortgagee, till he is satisfied all the money he has advanced? And it hath been adjudged that he shall (*b*) (I).

This decision was made upon this ground: that though the statute avoids deeds not registered, as against purchasers, yet it gives no greater efficacy to deeds that are registered than they had before; and the constant rule of equity is, that if a first mortgagee lends a further sum of money without notice of the second mortgage, his whole money shall be paid in the first place.

Indeed this rule ought to be more inflexible in a register than in any other county; because, by the establishment of the register, the second mortgagee hath the best possible means of discovering whether the estate is incumbered, and who the incumbrancer is; and if he has not searched the register, or, having searched the register, has neglected, in compliance with the general rule of equity, to give the prior incumbrancer notice of the second mortgage, he is not a proper object for the extraordinary protection of a court of equity: for even the rule of law is, *vigilantibus non dormientibus servat lex.*

(*b*) Bedford v. Backhouse, 2 Eq. Ca. Abr. 615, pl. 12; 2 Kel. in Cha. 5; Wrightson v. Hudson, 2 Eq. Ca. Abr. 609, pl. 7.

(I) Lord Redesdale has determined differently on the Irish registering act, because the act declares that every deed shall be effectual *according to the priority of the time of registry.* There appears to have been considerable difficulty in the way of this decision. Bushell v. Bushell, Latouche v. Lord Dunsany, 1 Scho. and Lef. 90. 137.

duly registered previously to his purchase? And it was decided by Lord Camden, in the case of Morecock *v.* Dickens (*g*), that he shall not.

This decision seems hardly reconcileable with the general principles of equity. It is manifest that a purchaser must search the register, if he intend to be safe; and it would not, perhaps, be too violent a presumption that every purchaser does search the register, especially when we advert to the very slight circumstances which are deemed constructive notice to a purchaser (*h*). The contrary doctrine evidently leads to perjury, which the statute intended to prevent (*i*). If, upon searching the register, a purchaser should meet with equitable incumbrances only, he might, upon the authority of Lord Camden's decision, purchase the estate, and then deny notice, and there are very few cases in which it could be proved that he actually did search the register.

But the case of Morecock *v.* Dickens would not, perhaps, be deemed an authority. Lord Camden seemed to make his decree (in opposition to his own opinion), because much property had been settled, and conveyances had proceeded on the ground of the determination in Bedford *v.* Backhouse (*k*). A thousand neglects, he said, had been occasioned by that determination, and therefore he could not take upon himself to alter it. He added, that if it was a new case, he should have had his doubts; but the point was closed by that determination, which had been acquiesced in ever since.

Now, Lord Camden's decision can only be considered an authority, so far as it is authorized by the case upon which he professed to ground his opinion: and it seems clear, that the case of Bedford *v.* Backhouse was not an

(*g*) Ambl. 678.
(*h*) See *post*, ch. 17.
(*i*) See Hine *v.* Dodd, 2 Atk. 275.
(*k*) *Supra.*

authority in point; and that the case before him was, in every respect, a new question.

In the case of Bedford *v.* Backhouse, by the known and settled rule of equity, the first mortgagee was entitled to hold against the second mortgagee, unless he had notice; and as the second mortgagee had it in his power to give such notice, and neglected doing so, the decision seems perfectly proper. But in the case before Lord Camden, the prior incumbrancer had no means whatever to acquaint the purchaser with the incumbrance, while he himself had it in his power to ascertain whether the estate was incumbered.—Where the neglect is the purchaser's, who else should bear the loss occasioned by that neglect? Besides, it seems clear that no person, *not being seised of the legal estate*, could ever have been induced to neglect searching the register on the authority of any of the cases on this subject, much less on that of Bedford *v.* Backhouse, which could not, one should think, be so misconstrued as to sanction or lead to such a neglect.

Since these observations were published, Lord Redesdale's decisions in Ireland have appeared. There are two cases in which the point in question was discussed, although it was not necessary to decide it; but Lord Redesdale expressed his opinion to be, that the registry of an equitable incumbrance was not notice to any subsequent purchaser. His Lordship admitted, that if a man searches the register, he will be deemed to have notice, and that no person thinks of purchasing an estate without searching the registry; but he thought it could not be considered as notice to all intents, on account of the mischiefs that would arise from such a decision. For if it is taken as constructive notice, it must be taken as notice of every thing that is contained in the memorial: if the memorial contains a recital of another instrument, it is notice of that instrument;

instrument; if a fact, it is notice of that fact (*l*). So, if it be notice, it must be notice whether the deed be duly registered or not; it may be unduly registered, and if it be so, the act does not give it a preference; and thus this construction would avoid all the provisions in the act for complying with its requisites (*m*).

Now, although one cannot but feel the weight of any observations of Lord Redesdale's on a point of this nature, yet these do not appear to be conclusive. The distinction endeavoured to be established in the text between the cases where the purchaser has, and where he has not the legal estate at the time of his purchase, was not discussed. Indeed, it was unnecessary to discuss it with reference to the registering act for Ireland. Lord Redesdale's opinion, therefore, was wholly extra-judicial. There can scarcely be any objection to the registry of a deed being deemed notice of all its contents, when a purchaser can require the production of the deed before he completes the contract. Certainly there appears to be great weight in the objection, that if the registry be of itself notice, it must be notice, although the deed be unduly registered. But this objection assumes what has never been decided; and it should seem that the courts might hold, without any violation of principle, that a purchaser should not be deemed to have notice of an equitable incumbrance by the mere registry of it, unless it was *duly* registered. Why should equity interfere in favour of an incumbrancer, when he has not complied with the salutary requisitions of that very act upon which he lays his foundation for relief? The reader is reminded, that these observations are addressed to the case of a purchaser *not*

(*l*) Bushell v. Bushell, 1 Scho. and Lef. 103; and see Pentland v. Stokes, 2 Ball and Beatty, 68.

(*m*) Latouche v. Lord Dunsany, 1 Scho. and Lef. 157; and see Underwood v. Lord Courtown, 2 Scho. and Lef. 64.

 having

having the legal estate at the time of his contract. And it is hardly necessary to say, that whatever private opinion may be entertained on this point, no one can be advised to rely on an equitable charge on an estate in a register county, although it is duly registered, and there is no prior incumbrance on the register.

The third and last question is, whether a person buying an estate with notice of a prior incumbrance not registered, shall in equity be bound by such incumbrance, although he hath at law obtained a priority by registering his deeds? And it hath been holden that he shall (*n*).

This decision is perfectly consonant to the general principles of equity. The intention of the act was to secure subsequent purchasers and mortgagees against *prior secret conveyances and fraudulent incumbrances*; and, therefore, where a person has notice of a prior conveyance, it is not a secret conveyance by which he can be prejudiced; for he can be in no danger where he knows of another incumbrance; because he might then have stopped his hand from proceeding, and therefore is not a person whom the statutes meant to relieve (*o*). But of course, notice of a prior unregistered instrument is unimportant at law. The first registered instrument must prevail at law (*p*).

(*n*) Lord Forbes *v.* Nelson, 2 Bro. P. C. 425; 2 Eq. Ca. Abr. 482, pl. 19; 3 Atk. 653, cited; Chivall *v.* Nicholls, Str. 664; Beatniff *v.* Smith, 1 Eq. Ca. Abr. 357, pl. 11; Blades *v.* Blades, 1 Eq. Ca. Abr. 358, pl. 12; Hine *v.* Dodd, 2 Atk. 275; Le Neve *v.* Le Neve, 3 Atk. 646; Sheldon *v.* Cox, Ambl. 624; and Jolland *v.* Stainbridge, 3 Ves. jun. 478; and see Cowp. 712; 1 Burr. 474; 1 Schoales and Lefroy's Rep. 102; Biddulph *v.* St. John, 2 Scho. and Lef. 521; Eyre *v.* Dolphin, 2 Ball and Beat. 290.

(*o*) Le Neve *v.* Le Neve, 3 Atk. 646.

(*p*) Doe *v.* Allsop, 5 Barn. and Ald. 142.

It

It will occur to the learned reader, that although the prior purchaser would, in a case of this nature, be relieved against the subsequent sale, yet the legal estate will be vested in the subsequent purchaser by force of the statute.

From the foregoing decisions, it is evident that a purchaser may be bound by a deed, although not registered; but it is equally clear, that it must be satisfactorily proved, that the person who registers the subsequent deed must have known exactly the situation of the persons having the prior deed; and knowing that registered, in order to defraud them of that title he knew at the time was in them (*q*). Apparent fraud, or *clear and undoubted notice*, would be a proper ground of relief; but suspicion of notice, though a strong suspicion, is not sufficient to justify the Court in breaking in upon an act of parliament (*r*). A *lis pendens* is not deemed notice for that purpose (*s*).

I have now brought to a conclusion the observations which I proposed to offer on the registering acts. If I might be allowed to express a general opinion on the provisions in these acts, explained as they are by the decided cases, I should be tempted to observe that they might be improved. I approve rather of the act for Ireland, though not to the extent to which it has been carried by the decisions of Lord Redesdale. I would by no means give an equitable charge the effect of a legal conveyance by the mere act of registry; at the same time that I would insure the priority of the charge as an *equitable* charge, by making the registry of an instrument notice to all subsequent purchasers. The rule, that notice of an unregis-

(*q*) See 3 Ves. jun. 485.

(*r*) See 2 Atk. 276; and Irons v. Kidwell, 1 Ves. 69, cited; Wyat v. Burwell, 19 Ves. jun. 435.

(*s*) 19 Ves. jun. 439.

tered incumbrance shall affect the conscience of a subsequent purchaser, I would not disturb, contemplating the present temper of the Courts, to confine this doctrine to cases of clear notice.

SECTION VI.

Of Protection from Acts of Papistry.

By the 11 and 12 W. III. c. 4, it was enacted, that papists who should not, within six months after attaining eighteen, take the oaths and subscribe the declaration therein mentioned, should, but as to himself or herself only, be incapable to take by descent, devise or limitation; and the estate should be enjoyed by the next of kin, being a protestant, during the life, or until the conformity of such papist. And by this act papists were rendered incapable of purchasing lands either in their own names, or in the names of trustees; and all estates made to them were declared to be utterly void and of none effect, to all intents, constructions and purposes whatsoever.

To remedy the inconveniences arising from this provision, it was by a modern statute (*t*) enacted, that no sale for a full and valuable consideration, by a papist, of any lands, or of any interest therein theretofore made, or thereafter to be made, to a protestant purchaser, should be impeached by reason of any disability of the vendor, or of any persons under whom he claimed, in consequence of the 11 and 12 W. III. (*u*); unless the person taking advantage of such disability should have recovered before

(*t*) 3 Geo. I. c. 18. See 29 Geo. III. c. 30, s. 4.

(*u*) *Vide supra*, p. 569.

the

the sale, or given notice of his claim to the purchaser, or before the contract for sale should have entered his claim at the quarter-sessions, and *bonâ fide* pursued his remedy. But it was expressly provided, that the clause in 11 and 12 W. III. disabling papists from purchasing, should remain in full force.

In the case of Fairclaim *v.* Newland (*v*), the Court of King's Bench expressed an extra-judicial opinion, that the statute of Geo. I. did not in every case authorize a sale by a papist to a protestant purchaser. They considered the statute of William III. as having different provisions for persons of different ages, viz. as to those under eighteen, estates limited to them were vested for the benefit of their posterity, *and these were intended to be able to convey to protestants*; but as to others above eighteen, they are absolutely disabled from taking any estate by purchase, and the statute of George never intended to enable them to convey what they had not.

In a case before Lord Hardwicke, two years afterwards, it was insisted that the proviso in the act of George restrained the enacting part to a statute of James recited in the act of George; and that the statute of William, by the express words of the proviso, remained in full force. Lord Hardwicke, however, said, "that the statute of William was to be sure made to prevent papists from acquiring new estates. Then came the statute of George I. and this statute, and the proviso in it, had a seeming repugnancy, and he would take notice, that the statute in this respect had always been doubtful; some people had thought that the proviso restrained the statute, and it was certainly a very odd proviso. But he thought the meaning of the proviso was only *ex abundanti cautela*

(v) 8 Vin. Abr. 73, pl. 4.

against

against papists, and was not designed to affect purchasers; for if it were otherwise, the security to protestant purchasers, under the statute, would be a most doubtful security." And he considered the enacting part of the statute as in full force for the benefit of a protestant purchaser, although it was not necessary to decide the point (*w*).

Mr. Wilbraham was one of the counsel for the plaintiff in the last case, and in an opinion given by him on this point a few years afterwards, he thought that the act of Geo. I. authorized a sale by a papist purchaser to a protestant purchaser, and was not in that respect controlled by the proviso. He stated, that as the opinion of the eminent conveyancers, from the time of passing the act in 1717, till about the year 1740, had been, that popish purchasers might sell; and as it was the opinion of the present Chancellor, and several eminent lawyers, they might sell, he was of the same opinion, though the Court of King's Bench seemed to be of a contrary opinion in a trial at bar, in the year 1741, between Fairchild and Newland (*x*). Indeed it seems surprising that any doubt should have arisen on this point, as the act was passed for the express purpose of encouraging Roman catholics to sell their estates to protestants, however they might have acquired them; and the legislature was only anxious that Roman catholics should not derive any power from the act to purchase *and hold* estates. A different construction would deprive the act of nearly all operation. It has now, however, long been thought the better opinion, that the proviso does not defeat the enacting part in favour of

(*w*) Wildigos *v.* Keeble, 8 Vin. Abr. 73, pl. 5. See S. C. cited, 1 Atk. 535; 2 Ves. 392, nom. Wildgoose *v.* Moore.

(*x*) 2 Vol. Cas. and Opin. 60; and see several other opinions, at 54 to 71.

protestant

protestant purchasers, and on the authority of it many purchases of considerable consequence have been made (*y*).

The act requires the sale to be "for a full and valuable consideration;" but the purchase will be protected by the statute, although a year's purchase more might have been obtained for the estate, the consideration being only evidence of the reality of the purchase (*z*).

And although a purchase from a papist was made under suspicious circumstances, yet if the purchaser has paid any part of the purchase money, he may plead the statute of William III. in bar to a bill for a discovery from him, whether the vendor was a papist; for by his discovery the estate might perhaps be recovered at law, and then he would lose the money he had paid (*a*).

On this statute it remains to observe, that a purchaser having notice of the vendor being a papist, and under a disability to hold, is immaterial, unless it was given to him by the person taking advantage of the disability according to the act of Geo. I.

SECTION VII.

Of Protection from Defects in Recoveries.

HERE may be mentioned the 4th section of the 14 Geo. II. c. 20, for which the profession is indebted to the late Mr. Pigot; whereby, after reciting that, by the default

(*y*) See Mr. Butler's learned note to Co. Litt. 391, a. s. 3. See also 43 Geo. III. c. 30; and see O'Fallon *v.* Dillon, 2 Scho. and Lef. 13, for the construction of popery acts.

(*z*) Wildgoose *v.* Moore, 1 Atk. 535; 2 Ves. 392, cited; *vide supra*; 2 Atk. 210; Barnard. Rep. Cha. 455; Smith *v.* Read, 1 Atk. 526.

(*a*) Harrison *v.* Southcote, 1 Atk. 528; 2 Ves. 389.

or

or neglect of persons employed in suffering common recoveries, it has happened, and may happen, that such recoveries are not entered on record, whereby purchasers for a valuable consideration may be defeated of their just rights: "It is enacted, that where any person or persons hath or have purchased, or shall purchase for a valuable consideration, any estate or estates, in lands, tenements or hereditaments, whereof a recovery or recoveries is, are or were necessary to be suffered, in order to complete the title, such person and persons, and all claiming under him, her or them, *having been in possession of the purchased estate or estates from the time of such purchase*, shall and may, *after the end of twenty years from the time of such purchase*, produce in evidence the deed or deeds making a tenant to the writ or writs of entry, or other writs for suffering a common recovery or recoveries, and declaring the uses of a recovery or recoveries; and the deed or deeds so produced (the execution thereof being duly proved) shall, in all courts of law and equity, be deemed and taken as a good and sufficient evidence for such purchaser and purchasers, and those claiming under *him, her* or them, that such recovery or recoveries was or were duly suffered and perfected, according to the purport of such deed or deeds, in case no record can be found of such recovery or recoveries, or the same shall appear not to be regularly entered on record: provided always, that the person or persons making such deed or deeds as aforesaid, and declaring the uses of a common recovery or recoveries, had a sufficient estate and power to make a tenant to such writ or writs as aforesaid, and to suffer such common recovery or recoveries."

SECTION VIII.

Of Protection from Defects in Sales for Land-Tax.

WE may here notice the 12th section of the 54 Geo. III. c. 173, whereby, after reciting that for the purpose of redeeming land-tax, or of raising money for reimbursing the stock or money previously transferred or paid, as the consideration for redeeming land-tax charged on lands and other hereditaments belonging to persons for the time being seised or possessed, or entitled beneficially in possession to the rents and profits of, but not having the absolute estate or interest in such lands or other hereditaments, or for some other purposes for which lands and hereditaments are authorized to be sold by such persons under the powers and provisions of the said act of the 42d year of his present Majesty, or of some subsequent act relating to the redemption and sale of the land-tax, some sales of lands and other hereditaments may have been or may be made by persons so seised or entitled, not strictly authorized to sell by such powers and provisions without some further assurance in the law, or by reason that all the lands and other hereditaments of or to which the persons making such sales were respectively so seised or entitled, did not at the times of such sales stand limited and settled, and subject to or for the same uses, trusts, intents and purposes, or by reason that a greater quantity of an estate has been sold than may have been necessary to be sold for the authorized purposes, or by reason of some other mistake or inadvertence; It is enacted, That all sales so made as aforesaid, and all conveyances executed

cuted of the lands or other hereditaments so sold, provided the same have been respectively made and executed *bonâ fide* and for valuable consideration, and shall appear to have been made and executed under the authority and with the consent and approbation of the commissioners as required by the said acts or any of them, in cases of sales under the powers of the said acts, shall be and the same are thereby ratified and confirmed from the respective periods at which such sales and conveyances were respectively made and executed, and shall be from such respective periods as valid and effectual in the law as if such sales and conveyances had been made and executed in strict conformity to the powers and provisions under which the same were intended to have effect, any thing in the said act of the 42d year of his present Majesty, or of any such subsequent act, as aforesaid, to the contrary notwithstanding. But this provision is qualified by a proviso, That every person injured or prejudiced by any sales hereby confirmed shall be entitled to relief either by the decree of a court of equity on a bill filed, or by a summary application to a court of equity by petition, and by the usual proceedings before the master or other proper officer of the court on such petition, and an order thereupon; and shall, under such decree or order, have an annual rent-charge to such an amount, and for and during such term or estate, and charged upon such lands or other hereditaments as such court shall order or direct; and the said court shall have full power to adjust the proportion and terms of such annual rent-charge between different claimants, and to direct the settlement of such annual rent-charge in such manner as the said court shall, under the circumstances of the case in its discretion, think proper; and shall also have power to make such order

respecting

respecting the costs of the parties as the said Court shall think fit.

By the 57th of his late Majesty, c. 100, s. 22, after reciting that it appeared that some deeds of sale, which previous to the revocation of the commissions theretofore granted under the royal sign manual, enabling the persons therein named to be commissioners for the redemption and sale of the land-tax, were intended to have been executed by and under the authority of the persons named in such commissions, had been executed by the tenants for life, or other persons having authority with the consent of such commissioners to make such sales, but had not been executed by such commissioners, and difficulties had in some instances arisen as to the mode of confirming titles under such imperfect conveyances, and that it was expedient that a discretionary power should be given to the commissioners for the affairs of taxes of confirming the same, and also any deed of mortgage or grant that might for the same cause be found imperfect, it was therefore enacted, That upon production to the commissioners for the affairs of taxes, or any two of them, of any deeds of sale, mortgage or grant that had been executed by any tenant or tenants for life, or other person or persons having authority under the land-tax redemption acts for the time being to make any such sale, mortgage or grant, with the consent and approbation of two or more of the commissioners for the time being appointed by and under the royal sign manual, but which deeds of sale, mortgage or grant had not been executed by the commissioners whose consent was necessary to the validity thereof respectively, it should be lawful for the said commissioners for the affairs of taxes, or any two of them, on their being satisfied that such deeds of sale, mortgage or grant would have

have been authorized and available under the powers and provisions of the said acts or some of them, if two of the commissioners for the time being, acting by virtue of the royal sign manual, had been parties to and executed the same, to sign and seal such deeds of sale, mortgage and grant, and to cause such indorsements to be made on such deeds respectively, as the said commissioners for the affairs of taxes might, under the circumstances of the case, think necessary or proper for showing their assent to and confirmation of such sales, mortgages or grants; and all such deeds of sale, mortgage or grant, which should be so signed and sealed by the said commissioners for the affairs of taxes, or any two of them, and upon which any such indorsement should be made, should be and the same were thereby respectively ratified and confirmed from the respective periods at which such sales, mortgages or grants were respectively intended to take effect, and the same should be from such respective periods as valid and effectual in the law, and be considered as conferring upon the respective purchasers or mortgagees of the lands and hereditaments therein respectively comprised, or upon the respective grantees of any rent-charges, and all persons claiming by, from, through, under or in trust for them respectively, as good a title to the lands or hereditaments sold or mortgaged, or to the rent-charges granted, as if two of the commissioners for the time being, acting under the royal sign manual, and who would have been competent under the acts for the time being to consent to such sales, mortgages or grants respectively, had approved of and consented thereto respectively, by signing and sealing such deeds respectively; and no deeds of sale, mortgage or grant, so to be confirmed, should require any stamp duty by reason of any execution thereof

thereof by the commissioners for the affairs of taxes, or by reason of any such indorsement to be made thereon, as aforesaid.

And it was further enacted (*a*), That where any contract should have been entered into for the redemption of any land-tax, and any contract should have been entered into for sale of any lands or other hereditaments for the purpose of raising money to complete the contract for the redemption of such land-tax, and it should appear that such contract for sale could not, under the powers and authorities of the land-tax redemption acts or any of them, or by reason of some defect in the title to the lands or other hereditaments comprised in such contracts for sale, be completed, it should be lawful for the commissioners for the affairs of taxes, or any two of them, to rescind and declare void such contract for redemption of land-tax, and thereupon it should be lawful for the said commissioners to make such orders, and give such directions, as they should think proper for the retransfer of any stock, or the repayment of any money that might have been previously transferred or paid in pursuance of such rescinded contract; and the governor and company of the Bank of England, the commissioners for the reduction of the national debt, and the several receivers-general in England and collectors in Scotland, to whom the same might respectively appertain, should, upon a certificate of such contract being so rescinded, make, and they are hereby respectively required to make, such retransfer or repayment accordingly.

And after reciting that it was expedient to make provision for the enrolment and register of deeds, which had not been duly enrolled or registered pursuant to the directions of the several acts passed relating to the redemption of the land-tax, it was enacted (*b*), That all deeds required

(*a*) Sec. 23. (*b*) Sec. 24.

by the said acts, or any of them to be enrolled or registered should be valid and effectual, although the same should not have been or should not be enrolled or registered within the periods prescribed by the said acts respectively, provided the same should have been enrolled or registered before the passing of the said act, or should be enrolled or registered within twelve calendar months after the passing thereof; and that in case any such deeds should not be enrolled or registered within twelve calendar months after the passing of the said act, or any deeds thereafter to be executed under the powers of the said acts or any of them, or of this present act, should not be enrolled or registered within six calendar months after the execution thereof respectively, it should be lawful for any two or more of the commissioners for the time being for the redemption and sale of the land-tax, if they should think fit, upon the production of any such deeds, to order the same to be enrolled or registered; and that all deeds to be enrolled or registered pursuant to any such order should be as valid and effectual as if the same had been enrolled or registered within the periods prescribed by the said acts or by this present act; and that all conveyances made subsequent to any deeds already enrolled or registered, or to be enrolled or registered under this act, and depending in point of title on such deeds, should be of the same effect as if such deeds had been enrolled or registered on the day of the date thereof; nevertheless, without prejudice to the validity of any assurances theretofore made or thereafter to be made to correct or supply any defects arising from the want of such enrolment or registry.

And after reciting that for the purpose of redeeming or purchasing land-tax, or of raising money for reimbursing the stock or money previously transferred or paid as the consideration for redeeming land-tax, or for purchasing

assignments

assignments of land-tax, or for some other purposes for which lands and hereditaments were authorized to be sold under the powers and provisions of the acts theretofore passed, relating to the redemption and sale of the land-tax or some of them, some sales of lands and other hereditaments had been made, the titles to which, as derived under such sales, might be considered void or voidable, or liable to be impeached at law or in equity, or be liable to objections calculated to impede the free alienation thereof, it was further enacted (*c*), That all sales made, and all conveyances executed, of lands or other hereditaments sold for the purpose of redeeming or purchasing land-tax, or for raising money as thereinbefore was mentioned, provided such conveyances should appear to have been executed under the authority and with the consent and approbation of the respective commissioners for the time being authorized to consent to sales made under the powers of the said acts respectively, or any of them, should be and the same were thereby ratified and confirmed from the respective periods at which such sales and conveyances were respectively made and executed, and the same should be from such respective periods valid and effectual, and be considered as conferring upon the respective purchasers of the lands and hereditaments therein respectively comprised, and all persons claiming by, from, through, under or in trust for them respectively, a good and valid title, both at law and in equity, to such lands and hereditaments, to all intents and purposes whatsoever; any thing in the said acts, or any law or custom to the contrary notwithstanding.

And it was further enacted (*d*), That every person who might conceive himself or herself injured or prejudiced by any sales thereby confirmed, should at any time within

(*c*) Sec. 25. (*d*) Sec. 26.

five years after the passing of the said act, if such persons should not be under any legal disability, but if he or she should be under any legal disability, then within five years next after such disability should be removed, be entitled to relief either by the decree of a court of equity, on a bill filed, or by a summary application to a court of equity by petition, and by the usual proceedings before the master or other proper officer of the court on such petition and an order thereupon, and should under such decree or order have an annual rent-charge to such amount, and for and during such term or estate, and charged upon such lands or other hereditaments, as such Court should order or direct; and the said Court should have full power to adjust the proportion and terms of such annual rent-charge between different claimants, and to direct the settlement of such annual rent-charge in such manner as the said Court should, under the circumstances of the case, in its discretion think proper; and should also have power to make such order respecting the costs of the parties as the Court should think fit.

SECTION IX.

Of Protection from Crown Debts.

FORMERLY, where the seller was a debtor or accountant to the crown, the title was not good until a *quietus* was entered up on record. And a purchaser could not be compelled to take the title, although the crown consented to the payment of the purchase money into the exchequer on account of the debt (*a*).

(*a*) Brakespear v. Innes, V. C. Master of the Rolls, MS.

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To obviate this difficulty, it was by the 10th section of an act of the 1st and 2d year of king George IV. c. 121, intituled, "An act to alter and abolish certain forms and proceedings in the exchequer and audit office relative to public accountants, and for making further provisions for the purpose of facilitating and expediting the passing of public accounts in Great Britain, and to render perpetual and amend an act, passed in the 54th year of his late Majesty, for the effectual examination of the accounts of certain colonial revenues," enacted, That in all cases where any estate belonging to a public accountant shall be sold under any writ of extent, or any decree or order of the Courts of Chancery or Exchequer, and the purchaser or purchasers thereof or of any part thereof shall have paid his, her or their purchase money into the receipt of his Majesty's exchequer, an entry of such payment shall be made by the commissioners for auditing the public accounts in the declared account of such public accountant, and from and after such payment and entry as aforesaid, such purchaser or purchasers, his, her and their heirs and assigns shall be wholly exonerated and discharged from all further claims of his Majesty, his heirs or successors, for or in respect of any debt arising upon such declared account, although his, her or their purchase money shall not be sufficient in amount to discharge the whole of the said debt.

This provision was made to meet a particular case, and is therefore by no means a general remedy. In the case alluded to, the debtor was dead, and there was a declared account against him, which, as he was dead, could not be increased by further receipts. Upon a petition by the seller after the act, the Master of the Rolls ordered the seller to pay the costs of the petition, and of the payment

into the exchequer, and of the entry being made by the commissioners. The purchaser claimed an abatement for dilapidations, and it was submitted whether the payment of the balance would satisfy the act. The Master of the Rolls held that it would.

With respect to the general operation of statutes passed in favour of purchasers, it may be laid down as a rule, that equity will not permit them to be taken advantage of where the purchasers have notice of the incumbrance or deceit which the statutes were intended to guard them against, because *qui scit se decipi non decipitur*, and the resolutions respecting voluntary settlements must be considered anomalous.

SECTION X.

Of Equitable Relief and Protection.

1. THUS have we taken a cursory view of the several statutes passed for the relief or protection of purchasers. The relief and protection afforded to purchasers by the rules of equity, form the next branch of our inquiry.

A court of equity acts upon the conscience, and as it is impossible to attach any demand upon the conscience of a man who has purchased for a valuable consideration, *bonâ fide, and without notice of any claim on the estate*, such a man is entitled to the peculiar favour and protection of a court of equity.

And it has been laid down as a general rule, that a purchaser *bonâ fide*, and for a valuable consideration, without notice

notice of any defect in his title *at the time he made his purchase*, may buy or get in a statute, mortgage or any other incumbrance, (and that, although it is satisfied); and if he can defend himself at law by any such incumbrance, his adversary shall never be aided in a court of equity for setting aside such incumbrance: for equity will not disarm a purchaser, but assist him; and precedents of this nature are very ancient and numerous, viz. where the Court hath refused to give any assistance against a purchaser, either to an heir, or to a vendor, or to the fatherless, or to creditors, or even to one purchaser against another (*a*).

And the favour and protection of a court of equity is extended to a purchaser, not only where he has a prior legal estate, but also where he has a better right to call for the legal estate than any other person (*b*).

A purchaser cannot, however, protect himself by taking a conveyance or assignment of a legal estate from a trustee, in whom it was vested upon express trusts (*c*).

The Court of Chancery will not supersede a commission of bankruptcy even for fraud, where there have been purchasers under it (*d*); for a commission being superseded, all falls with it (*e*). So equity will not relieve against a *bonâ fide* purchaser without notice, although the remedy be gone by accident (*f*), nor will it compel him to dis-

(*a*) Basset *v.* Nosworthy, Finch, 102; Jerrard *v.* Saunders, 2 Ves. jun. 454. See Anon. 2 Cha. Ca. 208; Hithcox *v.* Sedgwick, 2 Vern. 156.

(*b*) See 2 Vern. 600; Willoughby *v.* Willoughby, 1 Term Rep. 763; Blake *v.* Sir Edward Hungerford, Prec. Cha. 158; Charlton *v.* Low, 3 P. Wms. 328. *Ex parte* Knott, 11 Ves. jun. 609; Shine *v.* Gough, 1 Ball and Beatty, 436.

(*c*) Saunders *v.* Dehew, 2 Vern. 271; 2 Freem. 123.

(*d*) *Ex parte* Edwards, 10 Ves. jun. 104; *ex parte* Leman, 13 Ves. jun. 271; *ex parte* Rawson, 1 Ves. and Bea. 160.

(*e*) See 1 Ves. and Bea. 66.

(*f*) Harvy *v.* Woodhouse, Sel. Cha. Ca. 80; Bell *v.* Cundall, Ambl. 101.

cover any writings which may weaken his title (*g*); or take any advantage from him by which he may protect himself at law, or obtain terms of his antagonist (*h*); neither will equity give any person an advantage over (*i*) a purchaser, or any assistance against him (*k*); and his having taken a collateral security for the title will not make his case worse (*l*), unless the purchase by the vendor was fraudulent: in which case it would have considerable weight with a court of equity (*m*).

The rules on this subject have gone so far, that a purchaser *bonâ fide*, for valuable consideration, and without notice, has been allowed to take advantage of a deed which he stole out of a window by means of a ladder (*n*), and of a deed obtained by a third person without consideration, and by fraud (*o*).

If a man purchase for valuable consideration, without notice from a disseisor, and the disseisee is a trustee for another, although the general rule is, that a trustee is bound to convey, upon request, to his *cestui que trust*; yet if in this case the trustee refuse to convey the legal estate to the *cestui que trust*, or to suffer the latter to bring an ejectment in his (the trustee's) name, a court of equity will not compel the trustee to do so, because it would

(*g*) Bishop of Worcester v. Parkes, 2 Vern. 255; Hall v. Adkinson, 2 Vern. 463; 1 Eq. Ca. Abr. 333, pl. 54; Millard's case, 2 Freem. 43; Sir John Burlace v. Cook, 2 Freem. 24; Jerrard v. Saunders, 2 Ves. jun. 454.

(*h*) Walwynn v. Lee, 9 Ves. jun. 24.

(*i*) Bechinall v. Arnold, 1 Vern. 354.

(*k*) See Graham v. Graham, 1 Ves. 262.

(*l*) Lowther v. Carleton, For. 187, S. C. MS. See, however, White v. Stringer, 2 Lev. 105; Jennings v. Selleck, 1 Vern. 467.

(*m*) How v. Weldon, 2 Ves. 516.

(*n*) See a case cited in Sanders v. Deligne, 2 Freem. 123; and Siddon v. Charnells, Bunb. 298; and see Fagg's case, cited 1 Vern. 52, and reported in 1 Cha. Ca. 68, *nomine* Sherly v. Fagg, where the circumstances of theft does not appear.

(*o*) Harcourt v. Knowel, 2 Vern. 150, cited.

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in effect be granting relief against a purchaser (*p*). This case strongly marks the favour shown to a *bonâ fide* purchaser.

Equity will relieve a *bonâ fide* purchaser without notice from ancient statutes, if there be no direct proof on either side, and will decree them to be cancelled (*q*).

And this rule extends to mortgages, and all incumbrances which have lain dormant for a long time, and no demand made in respect thereof (*r*).

So equity will relieve a purchaser for valuable consideration against a defective execution of a power, in the same manner as he will be relieved against a defective surrender of copyholds (*s*).

But if a devisee, having an estate for life, with a power to dispose of the inheritance by *will*, sell the estate in his life-time, equity cannot relieve the purchaser, although by the effect of accident he has got the legal estate in fee-simple; for, in a case like this, the testator cannot be understood to mean that the devisee should so execute the power. The intention is, that he should give by will, or not at all; and it is impossible to hold, that the execution of an instrument or deed, which, if it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of the devisee's death, can be considered, in equity, an attempt in or towards the execution of the power (*t*).

(*p*) Turner *v.* Back, 22 Vin. p. 21. pl. 5, where the *cestui que trust* claimed under a voluntary settlement.

(*q*) Burgh *v.* Wolf, Toth. 226; Smith *v.* Rosewell, *ibid.* 247; and see *ibid.* 224.

(*r*) See Abdy *v.* Loveday, Finch, 250; Sibson *v.* Fletcher, 1 Cha. Rep. 32.

(*s*) *Vide infra*; and see Chapman *v.* Gibson, 3 Bro. C. C. 229; Treat. of Powers, ch. 6.

(*t*) *Per* Lord Eldon; Reid *v.* Shergold, 10 Ves. jun. 370. The opinions of several eminent lawyers were taken on this case, before it went into court, and they all agreed that the case was desperate. In fact, it was owing to those discussions that the plaintiff in this cause knew of his claim, and recovered the estate. *Vide supra*, 12.

The

The mistake or ignorance of any of the parties to a conveyance of their rights in the estate, will not turn to the prejudice of a *bonâ fide* purchaser for a valuable consideration (*u*).

If, however, upon a purchase, any person is required to join to obviate an objection to the title, and the objection is stated in such a manner as not to convey full information, the purchaser cannot avail himself of the instrument against the person executing it (*x*).

But if a person having only a general statement that there are objections to a title which his concurrence will obviate, upon that communication executes an instrument and conveys, there is nothing to affect the conscience of the purchaser, so that the person conveying could ever get the estate back. If he does not ask the nature of the objections, he determines against himself as to any question between him and the purchaser, if the deed does not show that the objections were withheld from him (*y*).

If a person, having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right (*z*), although covert (*a*), or under age (*b*).

And the same rule prevails even where the representation is made through a mistake, if the person making it might have had notice of his right (*c*) (I).

(*u*) Malden *v.* Menill, 2 Atk. 8.

(*x*) Lord Braybroke *v.* Inskip, 8 Ves. jun. 417.

(*y*) Lord Braybroke *v.* Inskip, *ubi sup.*

(*z*) Hobs *v.* Norton, 2 Cha. Ca. 128; Hanning *v.* Ferrers, 2 Eq. Ca. Abr. 356, pl. 20; and see 1 Freem. 310; 16 Ves. jun. 253.

(*a*) Savage *v.* Foster, 9 Mod. 35; and see Evans *v.* Bicknell, 6 Ves. jun. 174.

(*b*) Watts *v.* Creswell, 9 Vin. 415; 9 Mod. 38. 96, 97; 4 Bro. C. C. 507, n.; Clare *v.* Earl of Bedford, 13 Vin. 536; and see 3 Cha. Ca. 85. 123; Cory *v.* Gertaken, 2 Madd. 46.

(*c*) Pearson *v.* Morgan, 2 Bro. C. C. 388*; see also Teasdale *v.* Teasdale, Sel. Cha. Ca. 59; but observe the circumstances of that case.

(I) *Sed qu.* this as a generul rule, unless there be *fraud?* See Haycraft *v.* Creasy, 2 East, 92; Tapp *v.* Lee, 3 Bos. and Pull. 367; and see Holmes *v.* Custance, 12 Ves. jun. 279.

So,

So where a person, intending to buy an estate, inquires of another whether he has any incumbrance on the estate, and states his intention to buy it, if the person of whom the inquiry is made deny the fact, equity will relieve the purchaser against the incumbrance (*d*). Again, where a purchaser of an equitable right inquires of the trustee of the legal estate, whether he knows of any incumbrance, and he answers in the negative, if it turn out that he had notice of any charge, he will be answerable to the purchaser, although he plead forgetfulness in excuse (*e*).

But a person having an incumbrance upon an estate, is not bound to give notice of it to any person whom he knows to be in treaty for the purchase of the estate (*f*).

If a purchaser take a defective conveyance from the vendor, equity will compel the vendor and his heirs, and all other persons claiming under him by act of law, as assignees of a bankrupt, although without notice, and even persons claiming as purchasers for valuable consideration, if with notice, to make good the conveyance (*g*).

So a purchaser, by a defective conveyance, will be relieved against persons who did not consider the land as their original or primary security; although they may have obtained an advantage at law (*h*).

And if a man sell an estate to which he has *no title*, and after the conveyance acquire the title, he will be compelled to convey it to the purchaser.

But it seems to have been considered, that this is a personal equity attaching on the conscience of the party, and not descending with the land; and therefore, that if the

(*d*) *Supra*, p. 0.

(*e*) Burrowes v. Lock, 10 Ves. jun. 470; *supra*, p. 5.

(*f*) Osborn v. Lea, 9 Mod. 96.

(*g*) Jaques v. Huntley, 1 Cha. Rep. 5, cited; Taylor v Wheeler, 2 Vern. 564; Morse v. Falkner, 1 Anstr. 11; and see 2 Ves. jun. 151; 6 Ves. jun. 745; 11 Ves. jun. 625.

(*h*) Burgh v. Francis, Finch, 28; and see Gilb. For. Rom. 223.

vendor

vendor do not in his life-time confirm the title, and the estate descend to the heir at law, he will not be bound by his ancestor's contract (*i*). This opinion, however, seems open to much observation, and cannot, it is conceived, be relied on.

Where, however, the conveyance is not perfected with the solemnities positively required by an act of parliament, as in the case of the ship registry acts, equity cannot relieve, as it would be against the policy of the acts, unless perhaps there were direct fraud, in which case it should seem that equity would relieve (*k*).

It has been said, that every person who takes an assignment of a *chose* in action, gives personal confidence that there is no lien upon it (*l*). Upon the purchase of a *chose* in action, or of any equitable right, it is the invariable practice of the profession, to require notice of the sale to be given to the trustee. This of course binds his conscience. And notwithstanding the general rule that, with respect to equitable rights, *qui prior est tempore potior est jure* (*m*), it seems probable that equity would prefer a subsequent purchaser who had given a proper notice to the trustee, to a prior purchaser who had neglected to do so. At least there is a case (*n*) which seems, in some measure, to authorize this conclusion.

It may be laid down as a general rule, that a purchaser of a *chose* in action (*o*), or of any equitable title (*p*), must always

(*i*) Morse v. Falkener, 1 Anstr. 11.

(*k*) Speldt v. Lechmere, 13 Ves. jun. 588; *ex parte* Yallop, 15 Ves. jun. 60. See *ex parte* Wright, 1 Rose, 308.

(*l*) *Per* Lord Thurlow, in *case* Davies v. Austen, 1 Ves. jun. 247.

(*m*) See Tourville v Naish, 3 P. Wms. 307; and see 2 P. Wms. 495; 15 Ves. jun. 354; 2 Taunt. 415.

(*n*) Stanhope v. Earl Verney, Butler's n. (1) to Co. Litt. 290, b.; and see 1 Ves. 367; 9 Ves. jun. 410.

(*o*) Davies v. Austen, *ubi sup.* Turton v. Benson, 2 Vern. 764; Priddy v. Rose, 3 Mer. 86; Hamil v. Stokes, 4 Price, 161.

(*p*) Whitfield v. Fausset, 1 Ves. 387.

always abide by the case of the person from whom he buys, and will be entitled to all the remedies of the seller (*q*). And yet, as we have seen (*r*), there may be a case in which a purchaser of a *chose* in action, merely by sustaining that character, will be in a better situation than the person was of whom he bought. And it seems, that where a person purchases a specific legacy, delivered to the legatee by the executor, if there is a deficiency of assets, the creditors must follow their demand in reasonable time, or equity will not assist them, otherwise legacies would be eternally locked up, and creditors encouraged in their laches, and to call on purchasers of legacies to refund at a great length of time (*s*).

So if trustees suffer a tenant for life, of a renewable leasehold, to enjoy all the profits in breach of a trust reposed in them to renew out of the rents and profits, the assets of the tenant for life will be applicable in the first instance to their indemnity, and a purchaser from the tenant for life of his life interest, will also, it seems, be answerable to the person for whose benefit the renewal ought to have been made. But, as between the trustees and the purchaser, the latter is not primarily answerable. If they permit the tenant for life to apply to his own use all the rents and profits, and abstain from performing the trust, they cannot contend that it was the purchaser's duty to withhold any part of the rents and profits, or the consideration that came in place of them (*t*).

Where a purchaser, after the conveyance, or even before the conveyance, in prospect of the articles for sale being carried into execution, has laid out money in lasting improvements, there are but few cases in which he will not

(*q*) See *ex parte* Lloyd, 17 Ves. jun. 245.

(*r*) George *v.* Milbanke, 9 Ves. jun. 190; *supra*, p. 630.

(*s*) Cholmondley *v.* Orford, Ch. H. T. 1758, MS.

(*t*) Ld. Montford *v.* Ld. Cadogan, 17 Ves. jun. 485.

be

be allowed for them, in case the aid of a court of equity is required to relieve against the purchase (*u*).

And even supposing the Court to be unwilling to make an allowance for repairs and improvements, yet if an account of rents and profits is to be taken, and the plaintiff will not accept the account, according to the value of the estate when the purchaser entered, but insists to have the account taken according to the present value, the Court will compel him to make an allowance for repairs and improvements (*w*).

If, however, a man has acted fraudulently, and is conscious of a defect in his title, and with that conviction in his mind expends a sum of money in improvements, he is not entitled to avail himself of it. If a different rule should prevail, it would certainly, as Lord Clare remarked, fully justify a proposition, once stated at the bar of the Court of Chancery in Ireland, that it was a common equity to improve the right owner out of the possession of his estate. However, if the sums are large, that circumstance may influence the Court in decreeing an account from the time of filing the bill only, and not from the time of taking possession (*x*).

But if the aid of a court of equity is not required, and a person can recover the estate at law, equity, unless there be fraud, cannot, it is conceived, relieve the purchaser on account of money laid out in repairs and

(*u*) Edlin *v.* Battaly, 2 Lev. 152; Peterson *v.* Hickman, 1 Cha. Rep. 3, cited; Whalley *v.* Whalley, 1 Vern. 484; Savage *v.* Taylor, For. 234; Baugh *v.* Price, 1 Wils. 320; *ex parte* Hughes, 6 Ves. jun. 617; *ex parte* James, 8 Ves. jun. 337; Browne *v.* Odea, 1 Scho. and Lef. 115; and see 9 Mod. 412; Barnard. Cha. Rep. 450; 1 Vern. 159; Shine *v.* Gough, 1 Ball and Beatty, 444.

(*w*) Thomlinson *v.* Smith, Finch, 378.

(*x*) Kenny *v.* Browne, 3 Ridgw. P. C. 518.

improvements;

improvements; but must dismiss a bill for that purpose with costs (*y*).

Where a person purchases with notice of an incumbrance, although he pay off prior ones to which that incumbrance was posterior, yet he lets it in as the first incumbrance on the estate, and cannot claim the benefit of the prior incumbrances which he has paid off (*z*).

It seems, that where two persons claim a reversion, to which only one can be entitled, a bill will lie to perpetuate testimony, although both of them are purchasers, or only one of them is a purchaser (*a*); for such a bill calls for no discovery from the defendant, but merely prays to secure that testimony; which might be had at that time, if the circumstances called for it (I).

II. Thus have we seen how peculiarly a *bonâ fide* purchaser without notice is favoured and protected by equity. But if a purchaser have notice of any claim, or incumbrance, his conscience is affected; and a court of equity will then not only refuse to interfere in his favour, but will assist the claimant or incumbrancer, in establishing his claims against him: his having given a consideration will not avail him; for, as Lord Hardwicke observes, he throws away his money voluntarily, and of his own free will (*b*).

(*y*) See Needler *v.* Wright, Nels. Ca. Rep. 57; but see Peterson *v.* Hickman, 1 Cha. Rep. 3, cited. This case, probably, turned on the fraud in the wife standing by while the improvements were made without giving notice of her claim to the tenant.

(*z*) Toulmin *v.* Steere, 3 Mer. 210.

(*a*) See Lord Dursley *v.* Fitzhardinge, 6 Ves. jun. 251.

(*b*) See 3 Atk. 238; Fitz. T. Subpœna, pl. 2.

(I) But note, the point was not settled, and it does not seem quite clear, what determination it would receive; as retaining such a bill, is evidently granting relief against a purchaser.

And

And it may be laid down as a general rule, that a purchaser with notice is in equity bound to the same extent, and in the same manner, as the person was of whom he purchased (*c*). Thus, suppose trustees for preserving contingent remainders to join in destroying them, and to convey the estate to a purchaser, if the purchaser buy for a valuable consideration, and without notice, he cannot be affected.-- But if he buy with notice of the trust, although for a valuable consideration, he must convey the estates to the uses of the settlement (*d*).

But we may here observe, that it is at last settled, that trustees joining in a recovery after the first tenant in tail is of age, is not a breach of trust, and therefore a purchaser may safely buy under the title acquired by the recovery (*e*).

A purchaser will be bound, even at law, by a parol agreement for a lease not within the statute of frauds, the granting of which constituted part of the consideration, although it be not mentioned in the agreement for purchase, and the rent be not fixed (*f*).

But where the consent of a person is *essential to* the validity of a lease agreed to be granted, and he himself purchases the inheritance, although with full notice, yet he will not be bound by the agreement.

This was decided in a recent case, where a copyholder granted a lease to Luffkin for one year, and so from year

(*c*) Winged *v.* Lefebury, 1 Eq. Ca. Abr. 32, pl. 43; Jackson's case, Lane, 60; Gore *v.* Wigleworth, cited, *ibid.*; Earl Brook *v.* Bulkeley, 2 Ves. 498; Taylor *v.* Stibbert, 2 Ves. jun. 437; Lord Verney *v.* Carding, 1 Scho. and Lef. 345, cited; Crofton *v.* Ormsby, 2 Scho. and Lef. 583; Dunbar. *v.* Tredennick, 2 Ball and Beat. 304.

(*d*) Mansell *v.* Mansell, 2 P. Wms. 678.

(*e*) Biscoe *v.* Perkins, 1 Ves. and Bea. 485. The Lord Chancellor has since decided the same point in the same way.

(*f*) Denn *v.* Cartwright, 4 Esp. 29.

to

to year, if the lord would give a license. The lord of the manor purchased the reversion himself, and took a surrender in the name of a trustee. The terms of the demise were correctly stated in the abstract of the title; the agreement contained an exception of all subsisting leases (if any there were), and in a deed from the vendor to the purchaser's trustee, there was an exception in the covenant against incumbrances, "of the several and respective subsisting lease or leases, or agreements for leases, under which the present tenants now hold the premises." After the purchase, the lord gave notice to his trustee, that he would not grant any license to any copyholder of his manor to demise. The trustee then gave notice to Luffkin to quit, and brought an ejectment, in which he recovered, the Court of King's Bench being of opinion, that the lease did not operate as a lease for fourteen years (*g*). Then Luffkin filed a bill against the trustee and the lord for a specific performance, on the ground of the lord having notice of the lease, and of its being excepted in the contract, &c. A case was directed to the Court of Common pleas, who held, first, that the lease was not a lease for fourteen years; and secondly, that the tenant had no remedy on the covenant in the lease for quiet enjoyment (*h*). The cause then came on upon the equity reserved, and was fully argued by Romilly for the plaintiff, and by Hollist and Bosanquet for the defendants. And Lord Eldon, after taking a day to consider, pronounced judgment shortly, that there was not equity sufficient to support the bill (*i*).

This decision demands particular attention. It seems founded on great principles of equity, although the purchaser had voluntarily placed himself in a situation in

(*g*) Doe v. Luffkin, 4 East, 221.
(*h*) 1 New Rep. 163.
(*i*) Ch. 15th July 1805. S. C. 11 Ves. jun. 170.

which it was his interest to refuse his consent, without which the lease could not be sustained. We cannot fail to distinguish this case from that where a man, having a partial interest in an estate, agrees to grant a lease which his interest does not enable him to grant; and then joins with the remainder-man in selling the estate to a purchaser, with full notice of the agreement. There equity rightly holds the purchaser bound by the agreement. The vendor was bound to grant the lease, or to answer in damages for non-performance of the agreement; and as the purchaser had notice of the contract, and takes an estate which enables him to perform it, it is but just that he should be compelled to do so, in order to exonerate the vendor from an action for breach of the contract. And on this ground it should seem, that if in the case of Luffkin *v.* Nunn, Luffkin could have recovered on the covenant for quiet enjoyment, the lord would have been compelled to perform the agreement. If this had not been Lord Eldon's opinion, he would not have asked the Court of Common Pleas, whether Luffkin could recover on the covenant for quiet enjoyment in case he were evicted. *Lord Redesdale* appears to have overlooked this distinction, when in a late case he found fault with one point in the case of Taylor *v.* Stibbert, viz. that he thought the purchaser had a right to say, that having purchased from the son as well as the father, *and the covenant not being binding on the son's estate*, he should not be bound further than as he purchased an estate which was bound, and therefore that notice, or no notice, was of no consequence to him (*k*). The doctrine, however, can only apply to cases where the purchaser ought to indemnify the seller against the agreement.

Where a purchaser buys a reversion expectant upon a

(*k*) See 2 Scho. and Lef. 599.

particular

particular estate, as, subject to the life estate of *I. S.* although it turn out that no such estate is in existence, yet *I. S.* will be decreed to hold the estate during his life, against the purchaser (*l*).

Although a purchaser with notice should, to strengthen his estate, levy a fine, and five years were to pass without a claim, yet the fine and nonclaim would be inoperative; for as he purchased with notice, notwithstanding any consideration paid by him, he is but a trustee, and so the estate not being displaced, the fine cannot bar (*m*); so, although he purchase under a decree in equity, yet, if the decree was obtained by fraud, he cannot protect himself (*n*).

But where it is a mere legal title, and a man has purchased an estate which he sees himself has a defect upon the face of the deeds, yet the fine will be a bar, and not affect him with notice, so as to make him a trustee for the person who had the right, because this would be carrying it much too far, for the defect upon the face of the deeds is often the occasion of the fine being levied. This was laid down by Lord Hardwicke (*o*). And it was resolved in Fermor's case (*p*), that if *A* purchases land of *B*, and afterwards perceiving that *B* had but defeasible title, and that *C* had a right to it, *A* (I) levies a fine with proclamations to a stranger, or takes a fine from another with proclamations, with the intent to bar the right of *C*; this fine, so levied by consent, should bind, for nothing was done in

(*l*) Walton v. Stanford, 2 Vern. 279. See Doe v. Archer, 1 Bos. and Pull. 531.

(*m*) 1 Vern. 149; 2 Atk. 631; Kennedy v. Daly, 1 Scho. and Lef. 355.

(*n*) Kennedy v. Daly, 1 Scho. and Lef. 335; Giffard v. Hort, *ib.* 386.

(*o*) 2 Atk. 631; and see *ibid.* 390.

(*p*) 3 Rep. 79, a.

(I) *B* is by mistake inserted in the report for *A*.

this case which was not lawful. So the accepting a release of a right, is in no case an acknowledgment that a right existed. If it were an admission of right, it must always be liable to objections, because the consideration for the release is always much less than the value of the thing demanded; but in truth, the consideration given being less than the value of the thing demanded, the transaction amounts to a denial of the right, instead of an acknowledgment (*q*).

Notice, before actual payment of all the money, although it be secured (*r*), and the conveyance actually executed (*s*), or before the execution of the conveyance, notwithstanding that the money be paid (*t*), is equivalent to notice before the contract.

But if the conveyance be executed, and the money paid, a purchaser will not be affected by notice of an incumbrance, although a prior incumbrance, intended to be discharged, is not paid off (*u*).

And notice at the time of getting in a precedent incumbrance, as a protection against mesne charges, is not material, so that he had not notice at the time of the purchase (*x*). Indeed, after a conveyance is executed, it is seldom that a purchaser thinks of procuring a prior legal estate, unless he discovers some incumbrance on the estate, against which he is anxious to protect himself.

But although a purchaser has notice of an equitable claim by which his conscience is affected, yet a person

(*q*) Underwood *v.* Lord Courtown, 2 Scho. and Lef. 68.

(*r*) Tourville *v.* Naish, 3 P. Wms. 307; Story *v.* Lord Windsor, 2 Atk. 630; More *v.* Mayhow, 1 Cha. Ca. 34; 2 Freem. 175, pl. 235.

(*s*) Jones *v.* Stanley, 2 Eq. Ca. Abr. 685, pl. 9.

(*t*) Wigg *v.* Wigg, 1 Atk. 384.

(*u*) Meynell *v.* Garraway, Nel. Cha. Rep. 63.

(*x*) Cockes *v.* Sherman, 2 Freem. 13; and see 2 Ves. 574.

purchasing

purchasing from him *bonâ fide*, and without notice of the right, will not be bound by it (*y*).

So, on the other hand, a person with notice of an equitable claim, may safely purchase of a person who bought *bonâ fide*, and without notice of it (*z*); although this circumstance may influence the Court with respect to costs (*a*) (I). This rule is consistent with the others; it is not in favour of the purchaser with notice, but of the purchaser without notice. If a different rule prevailed, he might not be able to sell the estate.

It still remains to show what will be deemed sufficient notice to a purchaser; but the importance of this subject seems to demand a separate chapter.

(*y*) Ferrars *v.* Cherry, 2 Vern. 384; Mertins *v.* Joliffe, Ambl. 313; Lowther *v.* Carleton, MS. Barnard. Rep. Cha. 358; Forrester, 187; 2 Atk. 242. See Pitts *v.* Edelph, Toth. 284.

(*z*) Harrison *v.* Forth, Prec. Cha. 51; 1 Eq. Ca. Abr. 331, pl. 6; Brandling *v.* Ord, 1 Atk. 571; Sweet *v.* Southcote, 2 Bro. C. C. 66; 2 Dick. 671; Lowther *v.* Carleton, 2 Atk. 242; Andrew *v.* Wrigley, 4 Bro. C. C. 125.

(*a*) Andrew *v.* Wrigley, 4 Bro. C. C. 125.

(I) In Grounds and Rudiments of Law and Equity, p. 275, tit. 377, Lord Talbot is erroneously stated to have held in Lowther *v.* Carleton, that where a purchaser with notice conveys to another without notice, the second sale was vicious, because of the former conveyance being with notice; and the author of that book warmly espouses the doctrine.

CHAPTER XVII.

OF NOTICE.

NOTICE is either actual or constructive; but there is no difference between actual and constructive notice in its consequences (*a*).

I. Of actual notice little can be said. It requires no definition, and it need only be remarked, that, to constitute a binding notice, it must be given by a person interested in the property, and in the course of the treaty for the purchase. Vague reports from persons not interested in the property, will not affect the purchaser's conscience; nor will he be bound by notice in a previous transaction which he may have forgotten.

That vague reports from strangers are not notice, was decided in the case of Wildgoose *v.* Weyland (*b*), where one man came to a person about to buy a house, and told him to take heed how he bought it, for the vendor had nothing in it, but upon trust for *A*: and another person came to him, and told him it was not so, for the vendor was seised of the land absolutely. The information of the first proved correct, yet the purchaser was held not to have notice; because such flying reports were many times fables, and not truth; and if it should be admitted for a sufficient notice, then the inheritance of every man might easily be slandered.

And not only a mere assertion, that some other person claims a title is not sufficient, but, perhaps, a general claim

(*a*) See Ambl. 626.

(*b*) Goulds. 147, pl. 67; and Cornwallis's case, Toth. 254.

is

is not sufficient to affect a purchaser with notice of a deed, of which he does not appear to have had knowledge (*c*).

However, no person could be advised to accept a title concerning which there were any such reports, or assertions, without having them elucidated; because what one judge might think a flying, vague report, or a mere assertion, another might deem a good notice. For instance, in Fry *v.* Porter (*d*), Hale, C. B. in speaking of the point of notice in that case, (which, however, did not relate to a purchaser), said, "here are several circumstances that seem to show there might be notice, and a *public voice in the house*, or an *accidental intimation*, &c. may possibly be sufficient notice."

That the notice to the purchaser must be in the same transaction, seems to have been settled in a case (*e*) upon the statute of charitable uses (*f*), the facts of which were, that land given to charitable uses was intended to be sold by act of parliament, and when the bill was read in parliament, it was declared, that the land was chargeable with a charitable use, and an offer was made to otherwise assure the charitable use. The bill, however, did not pass, and the land was afterwards sold to one of the members of the House, who spoke in the debate on the bill; yet this notice was held not to be sufficient notice, because it was not known to the purchaser, except as a member of parliament.

It may be here proper to mention, that an action on the case for slander of the vendor's title will not lie against a person for giving notice of his claim upon an estate, either by himself or his attorney, at a public auction, or to any

(*c*) See Jolland *v.* Stainbridge, 3 Ves. jun. 478.

(*d*) 1 Mod. 300. See Butcher *v.* Stapely, 1 Vern. 363.

(*e*) See East Greenstead's case, Duke, 64; and the cases *infra*, as to notice to an agent. See 1 Ves. jun. 425.

(*f*) *Supra*, p. 643.

person about to buy the estate; although the sale be thereby prevented (*g*); and to sustain the action, malice in the defendant must be proved (*h*).

Nor will the action lie against the attorney, although he do not deliver the precise message of his principal, provided it be to the same effect.

II. Constructive notice, in its nature, is no more than evidence of notice, the presumptions of which are so violent, that the Court will not allow even of its being controverted (*i*); but it is difficult to say what will amount to constructive notice. The following rules may, perhaps, assist the learned reader in his researches.

I. Notice to the counsel, attorney, or agent of the purchaser, is notice to him (*k*); for otherwise, as Lord Talbot observed, a man who had a mind to get another's estate, might shut his own eyes, and employ another to treat for him who had notice of a former title; which would be a manifest cheat (*l*). And the same rule prevails, although the counsel, attorney or agent, be the vendor (*m*), or be concerned for both vendor and purchaser (*n*).

So notice to the town agent of the purchaser's attorney in the country, is also notice to the purchaser (*o*).

(*g*) Hargrave *v.* Le Breton, 4 Burr. 2422.

(*h*) Smith *v.* Spooner, 3 Taunt. 246. See Rowe *v.* Roach, 1 Maw. and Selw. 304; Pitt *v.* Donovan, *ib.* 639.

(*i*) See 2 Anstr. 438; *per* Eyre, C. B.

(*k*) Newstead *v.* Searles, 1 Atk. 265; Le Neve *v.* Le Neve, 3 Atk. 646; 1 Ves. 64; Brotherton *v.* Hatt, 2 Vern. 574; Ashley *v.* Baillie, 2 Ves. 368; Maddox *v.* Maddox, 1 Ves. 61; and see 3 Cha. Ca. 110.

(*l*) Attorney-General *v.* Gower, 2 Eq. Ca. Abr. 685, pl. 11. See Ambl. 626.

(*m*) Sheldon *v.* Cox, Ambl. 624.

(*n*) Le Neve *v.* Le Neve, 3 Atk. 646.

(*o*) Norris *v.* Le Neve, 3 Atk. 26.

And

And it is immaterial that the purchase is made under the direction of a court of equity; and infants are equally bound with adults (*p*).

And if a person, with notice of any claim, purchase an estate in the name of another, without his consent, yet if he afterwards assent to it, he is bound by the notice to his agent (*q*). So a man cannot elude the effect of having notice, by procuring the conveyance to be made to a third person (*r*).

But although, if a man purchase an estate which is subject to an equity only, of which he or his agent has notice, it is a fraud; yet, if an instrument is signed by all parties, the intention cannot be interpreted, contrary to such instrument, by notice to an agent, that some of the parties had such intention (*s*).

Although the counsel, attorney or agent, be employed only in part, and not throughout the transaction, the purchaser is equally affected by the notice. This was doubted in the case of Vane *v.* Lord Barnard (*t*); but in the later case of Bury *v.* Bury, before Lord Hardwicke (*u*), he said, "where an agent has been employed for a person in part, and not throughout, yet that affects the person with notice."

The notice to the counsel, attorney or agent, must, however, be in the same transaction; because he may very

(*p*) Toulmin *v.* Stare, 3 Mer. 210. A petition for rehearing was presented, which was afterwards withdrawn under circumstances not connected with the legal points in the case.

(*q*) Merry *v.* Abney, 1 Cha. Ca. 38; 1 Eq. Ca. Abr. 330; 2 Freem. 151; Nels. Cha. Rep. 59; Jennings *v.* Moore, 2 Vern. 609; 1 Bro. P. C. 244.

(*r*) Coote *v.* Mammon, 5 Bro. P. C. by Tomlins, 355.

(*s*) See 1 Bro. C. C. 351.

(*t*) Gilb. Eq. Rep. 6. See 2 Pow. Mortg. 597, 598, 4th edit.

(*u*) Chan. 11th July 1748, MS. Appendix, No. 25.

easily

easily have forgotten it (*v*); and if this were not the rule of the Court, it would be of dangerous consequence, as it would be an objection against the most able counsel, because of course they would be more liable than others of less eminence to have notice, as they are engaged in a great number of affairs of this kind (*x*). The same rule of course applies to the purchaser himself. If a man purchases an estate, under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards purchases the other lands to which an apparent title is made, independent of that deed, the former notice of the deed will not of itself affect him in the second transaction, for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase (*y*).

2. A public act of parliament binds all mankind; but a private act of parliament is not, of itself, notice to a purchaser (*z*). And it is conceived, that an act of parliament of a private nature, but made a public act (I), in order that it might be judicially taken notice of, instead of being specially pleaded, and to save the expense of an attested

(*v*) Preston *v.* Tubbin, 1 Vern. 286; Fitzgerald *v.* Fauconberge, Fitzgib. 297; 2 Eq. Ca. Abr. 682, (D.) n. (b); Warwick *v.* Warwick, 3 Atk. 291; Worsley *v.* Earl of Scarborough, 3 Atk. 392; Steed *v.* Whitaker, Barnard. Cha. Rep. 220; Hine *v.* Dodd, 2 Atk. 275; Lowther *v.* Carleton, 2 Atk. 242, S. C. MS.; Ashley *v.* Baillie, 2 Ves. 368. See 1 Ves. 435.

(*x*) *Per* Lord Hardwicke, 2 Atk. 242.

(*y*) Hamilton *v.* Royse, 2 Scho. and Lef. 327. *Per* Lord Redesdale; Mountford *v.* Scott, 3 Madd. 34.

(*z*) See 2 Ves. 480.

(I) This will not happen in future, for it has been resolved that a *private* act shall not be made a public act; but it may be enacted, that the act shall be printed by the king's printer, and that a printed copy of it shall be evidence.

copy,

copy, would not be deemed such a public act as to be, of itself, notice to a purchaser (*a*).

3. *Lis pendens* is of itself notice to a purchaser (*b*), unless it be collusive, in which case it will not bind him (*c*), but it is not of itself notice for the purpose of postponing a registered deed (*d*).

A *subpœna* served, is not, however, a sufficient *lis pendens*, unless a bill be filed (*e*); but when the bill is filed, the *lis pendens* begins from the service of the *subpœna*. And the question must relate to the estate, and not merely to money secured upon it (*f*); but a bill to perpetuate the testimony of witnesses, and to establish a will, is a sufficient *lis pendens* (*g*).

To affect a purchaser, it has been said that there ought to be a close and continued prosecution of the *lis pendens* (*h*), and this is required by Lord Bacon's rule. In a late case (*i*), the Master of the Rolls cited the following passage from Lord Nottingham's prolegomena of equity: "The Lord Bacon, in his 12th rule, seems to direct, that if a purchase is made *pendente lite*, after some long intermission, this case shall differ from the common case. But the rule, though reasonable, is not always observed;

(*a*) See 3 Bos. and Pull. 578.

(*b*) See Toth. 45; Yeavely *v.* Yeavley, Toth. 227; 3 Cha. Rep. 25; Digs *v.* Boys, Toth. 254; Culpepper *v.* Ashton, 2 Cha. Ca. 116. 223; Barns *v.* Canning, 1 Cha. Ca. 300; Sorrell *v.* Carpenter, 2 P. Wms. 482; and see 3 P. Wms. 117; Garth *v.* Ward, 2 Atk. 174; 3 Barnard. Rep. Cha. 450; Worsley *v.* Earl of Scarborough, 3 Atk. 392; Walker *v.* Smalwood, Ambl. 676; 5 Co. 47, b; Hill *v.* Worsley, Hard. 320; Goldson *v.* Gardiner, 1 Vern. 459, cited; the Bishop of Winchester *v.* Paine, 11 Ves. jun. 194.

(*c*) 2 Cha. Ca. 116.

(*d*) 19 Ves. jun. 439.

(*e*) Anon. 1 Vern. 318.

(*f*) Worsley *v.* Earl of Scarborough, 3 Atk. 392.

(*g*) Garth *v.* Ward, 2 Atk. 174.

(*h*) Preston *v.* Tubbin, 1 Vern. 286.

(*i*) Bishop of Winchester *v.* Paine, 11 Ves. jun. 194.

for

for in Martin *v.* Stiles, 1663, the bill filed in 1640, abated by the death in 1648 : a bill of revivor was filed in 1662; and the purchase was in 1651 ; and yet the purchaser was bound, because now, by relation of the bill of revivor, it was *pendente lite: per* Clarendon, Chancellor." This passage was cited as an authority, that a purchaser during the abatement of the suit is bound in like manner as if the suit was in full prosecution. But the learned judge by whom it was quoted, treated this as a case of great difficulty, notwithstanding the authority of Lord Nottingham. Indeed, the case referred to seems to depend too much on its own circumstances and the times in which it occurred, to serve as a precedent. The Lord Keeper expressly said, that the war and infancy excused the laches. Besides, it appears that the person who came in *pendente lite* did not claim by purchase for money, but under the will of the person against whom the original bill was filed (*j*). If the point should ever call for a decision, it will probably turn on the question, whether the plaintiff was guilty of laches in reviving the suit.

Lord Redesdale appears to have held, that although a bill is dismissed, yet a party, purchasing after the dismissal, was a purchaser *pendente lite*, if an appeal was afterwards brought in the House of Lords, since it was still a question whether the bill was *rightly* dismissed, and the parties thus having notice, must take subject to all the legal and equitable consequences; but it was not necessary to decide whether such a purchase was by force of the supposed *lis pendens* made with implied notice of the adverse title (*k*).

A purchaser *pendente lite*, on filing his supplemental bill, goes into the Court *pro bono et malo*, and will be liable to all the costs in the proceedings, from the beginning to the

(*j*) Style *v.* Martin, 1 Cha. Ca. 150. (*k*) 1 Dow, 31.

end

end of the suit (*l*); and he will not be admitted to examine the justice of a former decree, but will be bound by the prior proceedings (*m*).

Relief being sought against a *bonâ fide* purchaser who bought *pendente lite*, without actual notice, is, however, considered a hard case in equity; and although the Court cannot refuse its aid against him, yet the plaintiff is by no means a favourite; and therefore if he make a slip in his proceedings, the Court will not assist him to rectify the mistake (*n*).

The mere pendency of a suit will not prevent the defendant from selling the property, the subject of the suit, but the purchase will, in no manner, affect the right of the plaintiff, except so far as it may be necessary to go against the purchaser, if he obtain a transfer of the *legal* estate (*o*). If, however, the plaintiff have only a defeasible estate, the defendant may exercise his right to put an end to it, notwithstanding the pendency of the suit.—Therefore, if a man make a voluntary settlement, and the person claiming under it file a bill against the settlor, to have the trusts performed, yet the defendant may defeat the plaintiff's right by selling the estate to a purchaser during the pendency of the suit. The same observation applies to a settlement with a power of revocation. The settlor, the defendant, may revoke the settlement, although a suit is depending for carrying it into execution (*p*).

4. Decrees of the courts of equity are not of themselves notice to a purchaser (*q*).

(*l*) See 1 Atk. 89; and Gaskell v. Durdin, 2 Ball and Beatty, 167.

(*m*) Finch v. Newnham, 2 Vern. 216.

(*n*) Sorrell v. Carpenter, 2 P. Wms. 482.

(*o*) Metcalfe v. Pulvertoft, before the Vice-Chancellor, 10th August 1813. See 1 Ves. and Beam. 180; 2 Ves. and Beam. 200.

(*p*) S. C.

(*q*) See Toth. 45; *Prac. Reg.* Cha. 125; and see Sir Thomas Harvey v. Montague, 1 Vern. 57. 122.

This

This was expressly decided in Worsley *v.* the Earl of Scarborough (*r*); in which case it appears, by a manuscript note of the late Mr. Coxe's to the case of Preston *v.* Tubbin, in his copy of Vernon, in Lincoln's-Inn Library, that Lord Hardwicke held most decidedly, that decrees were not notice. He said there was no such doctrine, that men were to take notice of the decrees of this Court, though they were to take notice of a *lis pendens*. In Sorrel *v.* Carpenter (*s*), it was said by Lord Chancellor King, that the Court will oblige all to take notice of its decrees as much as of judgments. This *dictum* is frequently quoted as an authority to prove that the decrees of equity are notice to purchasers; but it was only an *obiter dictum*; and, indeed, as judgments are not of themselves notice to a purchaser, it does not appear to affect the question. At first sight, the case of Wortley *v.* Birkhead (*t*), seems to militate against the doctrine, but on examination, it will be found not to disturb it; that case having only settled, that after a decree, and direction to settle the priorities of the demands, a puisne incumbrancer cannot take the first incumbrance, and thereby gain a preference to the second; *as it would lay a foundation for the greatest collusion and contrivance between the parties to exclude each other.*

Decrees, however, which do not put an end to the suit, as decrees to account, are of themselves notice to a purchaser (*u*); because the *lites pendentes* are not thereby terminated.

5. The docketing of judgments is not of itself notice to a purchaser;

(*r*) 3 Atk. 392; and see Rivers *v.* Steele, *Lib. Reg.* U. 128; temp. Lord Hardwicke, referred to by Mr. Coxe. Note, owing to the generality of the reference, I could not find this case in the register's book.

(*s*) 2 P. Wms. 482.

(*t*) 2 Ves. 571.

(*u*) Worsley *v.* Earl of Scarborough, 3 Atk. 392.

a purchaser (*w*); for, as Lord Talbot observed, judgments are infinite (*x*).

6. Registration of deeds is not of itself notice to a purchaser who was seised of a legal estate at the time of the purchase. In a former part of this work (*y*), some observations are submitted to the learned reader, which tend to show, that a person not being seised of the legal estate at the time of his purchase, is bound by all incumbrances duly registered, although he had not actual notice of them; or, in other words, that in such cases registered deeds are of themselves notice to purchasers.

7. Neither an act of bankruptcy (*z*), nor a commission of bankruptcy (*a*), is notice to a purchaser.

Indeed, a decision, that an act of bankruptcy is of itself notice to a purchaser, would operate as a repeal of the provision in the statute of James, in favour of purchasers from bankrupts. For, as we have already seen, a purchaser, with notice of the act of bankruptcy, cannot take advantage of the statute (*b*).

Upon the general rule in equity in favour of purchasers, and upon the ground that an act of bankruptcy is not of itself notice to a purchaser, Lord Talbot, in the case of Collet *v.* De Gols (*c*), decided, that if a mortgage of a legal

(*w*) Snelling *v.* Squint, 2 Cha. Ca. 47; Greswold *v.* Marsham, 2 Cha. Ca. 170. See Ambl. 154; Churchill *v.* Grove, 1 Cha. Ca. 37; 2 Freem. 176.

(*x*) 2 Eq. Ca. Abr. 682, (D.) n. (b).

(*y*) *Vide supra*, p. 674.

(*z*) Wilker *v.* Bodington, 2 Vern. 599; Anon. 2 Cha. Ca. 136; Collet *v.* De Gols, For. 65; and see 4 Burr. 2425; *ex parte* Knott, 11 Ves. jun. 609; but see p. 581.

(*a*) Hithcox *v.* Sedgwick, 2 Vern. 156; reversed in *Dom. Proc.* See Journals of the House of Lords, vol. xiv. p. 601; and see 7 East, 161. See also Sowerby *v.* Brooks, 4 Barn. and Ald. 523, where the court was not aware of the reversal in *D. P.* of Hithcox *v.* Sedgwick.

(*b*) *Vide supra*, p. 645.

(*c*) For. 65.

estate

estate be made *before* an act of bankruptcy, and the mortgagee make further advances *after* the act of bankruptcy, but without notice, the assignees cannot compel a redemption without payment of *all* the money advanced, that is, that the mortgagee not having had notice, may make use of his prior legal estate as a protection against the commission of bankruptcy. Upon the same principle Lord Mansfield laid it down, that if an estate be purchased without notice of an act of bankruptcy, the purchaser may protect himself by a satisfied term prior to the act of bankruptcy still standing out (*d*).

In a case, however, before Lord Redesdale, in which Collet and De Gols was incidentally mentioned, he is said to have observed, that it is now the constant practice for the assignees to compel a redemption on payment only of what was advanced before the bankruptcy. He did not, however, express any opinion on the point (*e*). In a late case before Lord Eldon (*f*), in which this question was discussed, but did not call for a decision, his Lordship, in the course of the argument, said, " the case of Collet *v.* De Gols *proves* that money advanced after an act of bankruptcy, may be tacked and charged upon the estate, notwithstanding the property is taken out of the bankrupt; and it was urged there, that he had nothing to convey by the second mortgage, yet it was held, that though the legal effect of the second mortgage is nothing, the Court will consider it a second incumbrance. The distinction was taken, that a secret act of bankruptcy does not prevent tacking as a commission issued actually does, that being notice to all the world." In delivering judgment, he observed, " that it was said, the act divests the bankrupt of all his interest, and when the commission follows,

(*d*) 4 Burr. 2425.
(*e*) 1 Scho. and Lef. 152.
(*f*) *Ex parte* Knott, 11 Ves. jun. 609.

it

it operates by relation from the time the act of bankruptcy was committed: unquestionably it does; and then the person taking the second security really takes nothing; no interest passing from the bankrupt, and therefore, shall not tack. *All the cases show that this objection will not do,* for then it would have been in vain to discuss whether there is a difference between securities after an act of bankruptcy, and after a commission issued. It follows of necessity that the law [*qu. effect*] is the same in both cases, for the operation of the commission is in either case precisely the same, reducing to dust and ashes the second security.

From these observations Lord Eldon's opinion appears to be, that Collet *v.* De Gols is still a binding authority. If it should be thought difficult to reconcile the last sentence with what precedes it, that must give way to what is before so clearly expressed. Perhaps, however, Lord Eldon intended merely to say, that though the *law* is different in these cases, *yet the effect* of the commission is the same whether it issued previously to the second mortgage, or subsequently to it, but upon a prior act of bankruptcy.

A case came before Lord Erskine, in which the precise point called for a decision. His Lordship considered Lord Eldon and Lord Redesdale as having both expressed their opinion against Collet *v.* De Gols, and he accordingly overruled it, and decided that a mortgagee could not tack advances subsequent to an act of bankruptcy, although made without notice, and the mortgagee had a prior legal estate (*g*).

This decision must, it should seem, prevent a purchaser who buys without notice of an act of bankruptcy, from availing himself of a prior legal estate as a protection against the commission; and yet it has always been con-

(*g*) *Ex parte* Herbert, 13 Ves. jun. 183.

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89; (*m*) Hiern v. Mill, 13 Ves. jun. 114.
171.

sidered clear, that a purchaser could not in such a case be disturbed. The cases, however, cannot be distinguished. The mortgagee was a purchaser *pro tanto*, and he, like a purchaser out and out, relied on his legal estate *prior* to the act of bankruptcy as a protection against the subsequent commission. But we have seen that it was taken from him.

The decision is open to much observation. It entirely subverts the established rule of equity, that a purchaser without notice shall not be relieved against, and an act of bankruptcy is not of itself notice. It proceeded, too, partly on an opinion attributed to Lord Eldon, but which, it should seem, he never entertained; and it escaped observation, that, as we shall shortly see, it has been decided in the House of Lords, that a mortgagee without notice may tack advances subsequently even to a *commission* of bankruptcy. That case must of necessity overrule all others, and the case of Collet *v.* De Gols may, therefore, be still thought to be a binding authority.

But where a purchaser claims the benefit of Sir Samuel Romilly's act (*h*), a commission issued, *although* afterwards superseded, or a docket struck, will, by force of the statute, be constructive notice to him of any prior act of bankruptcy.

With respect to a commission of bankruptcy, it was, in Hithcox *v.* Sedgwick, held by Lords Commissioners Trevor and Hutchins, against Lord Commissioner Rawlinson, that a *commission* of bankruptcy was notice to a purchaser; and that case is considered by the profession as having settled that a commission of bankruptcy is of itself notice (*i*).

(*h*) *Vide supra*, p. 646.

(*i*) See For. 70; 9 Ves. jun. 28; 1 Pow. Mortg. 563, 4th edit.; Cooke's B. L. 628, 2d edit.; Cullis's B. L. 235; 2 Cruise's Digest, 259; *ex parte* Knott, 11 Ves. jun. 609.

But

But it appears, that upon appeal to the House of Lords the decree against Sedgwick was reversed, and the estate ordered to be sold, and Sedgwick to be paid the 2,200 *l.* (*the money advanced after the commission issued*), with interest, costs and charges as mortgagees are usually allowed; which was of course deciding, that a commission of bankruptcy is not of itself notice to a purchaser, and that advances made without notice subsequently to the commission may be tacked to the prior mortgage. In the late Mr. Coxe's copy of Vernon, in Lincoln's-Inn Library, is a note to the case of Hithcox *v.* Sedgwick, (which must have been written before the publication of the Lords Journals,) in which he states, that Mr. I. Ord had told him the decree was reversed on appeal to the House of Lords as against Sedgwick, and that he (Ord) found it so said in a note of this case, taken by Lord Trevor, in which he says, the decree was so reversed; and that he was counsel on the appeal for Sedgwick.

8. What is sufficient to put a purchaser upon an inquiry, is good notice (*k*); that is, where a man has sufficient information to lead him to a fact, he shall be deemed conusant of it. Therefore, if a man knows that the legal estate is in a third person at the time he purchases, he is bound to take notice what the trust is (*l*). So notice that the title deeds are in another man's possession, may be held to be notice of any equitable claim which he may have on the estate, and as a security for which he held the deeds (*m*).

This doctrine has been carried so far, that notice that part of the estate was in possession of a tenant hath been holden to be notice of a lease, although the purchaser

(*k*) Smith *v.* Low, 1 Atk. 489; Taylor *v.* Baker, 1 Dan. 71.

(*l*) Anon. 2 Freem. 137, pl. 171.

(*m*) Hiern *v.* Mill, 13 Ves. jun. 114.

took it for granted that the tenant was only so from year to year (*n*). And if the tenant has even changed his character by having agreed to purchase the estate, yet his possession amounts to notice of his equitable title as purchaser (*o*); and consequently a subsequent purchaser, although without actual notice, will be considered as a purchaser of the seller's title, subject to the equity of the tenant, the first purchaser, to have the estate conveyed to him at the price which he had stipulated to pay to the seller. In such a case, therefore, a specific performance will be decreed in favour of the tenant against the seller, and the second purchaser and they will be left to settle their rights between themselves (*p*). The cases have gone so far, that a purchaser cannot be advised to complete a contract for an estate not in the seller's own occupation, without a communication with the tenants, in order to ascertain what their interests really are. So where a tenant had an interest under an agreement posterior to the lease under which he held, the purchaser was held to be bound by it although he had not notice of it (*q*).

Where a man had made an equitable mortgage to *A*, and upon afterwards giving a security to another person, stated that he had given a judgment or warrant of attorney to *A* for money borrowed of him, this was held to be notice of the mortgage (*r*).

In a late case, where a charity lease was sought to be set aside as improvidently made, upon the common equity, and it appeared that some of the parties stood in the character of purchasers, Lord Eldon said, though the purchaser of a lease has never been considered as a pur-

(*n*) See 2 Ves. jun. 440; 13 Ves. jun. 121.

(*o*) Daniels *v.* Davidson, 16 Ves. 249; and see Crofton *v.* Ormsby, 2 Scho. and Lef. 583.

(*p*) 17 Ves. jun. 433.

(*q*) Allen *v.* Anthony, 1 Mer. 282.

(*r*) Taylor *v.* Baker, 5 Price, 306.

chaser

chaser for valuable consideration, *without notice*, to the extent of not being bound to know from whom the lessor derived his title, he (Lord Eldon) was not aware of any case that had gone the length that the purchaser was to take notice of all those circumstances under which the lessor derived that title. Therefore, although the parties before the Court must be understood at least to have notice that the lessors were trustees for a charity, yet he could not go the length that the purchasers had notice that the lease was bad; that depending on a number of circumstances dehors the lease (*s*).

But this of course, as in all other cases of notice, only prevails in equity; for although a purchaser has actual notice of a lease, yet if it be invalid, he may, at law, recover the possession from the lessee (*t*).

Notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title. Therefore, if a person equitably entitled to an estate let it to a tenant who takes possession, and then the person having the legal estate, sells to a person who purchases *bonâ fide* and without notice of the equitable claim, the purchaser must hold against the equitable owner, although he had notice of the tenant being in possession.

So a purchaser *bonâ fide* and without notice, cannot be affected by the mere circumstance of the vendor having been out of possession many years. Thus, in a case (*u*) (I) where *A* covenanted to surrender lands to uses, which were

(*s*) Attorney-General v. Backhouse, 17 Ves. jun. 293. See 3 Ridg. P. C. 512.

(*t*) Doe v. Luffkin, 4 East, 221.

(*u*) Oxwith v. Plummer, Bac. Abr. T. Mortgage, (E.) s. 3; 2 Vern. 636, S. C.

(I) From the report in Vernon, it seems that Lord Cowper thought there was no specific agreement to surrender the copyhold to Oxwith; but the report in Bacon is very full and circumstantial.

enjoyed accordingly, although no surrender was made; and *A*, thirteen years afterwards, surrendered the same lands to *B* for valuable consideration, without notice of the covenant; *B* was holden to be entitled to the lands, and the covenantees were left to their remedy at law.

In all cases where a purchaser cannot make out a title but by a deed which leads him to another fact, whether by description of the parties, recital or otherwise, he will be deemed conusant thereof; for it was *crassa negligentia* that he sought not after it (*v*); and for the same reason, if a purchaser has notice of a deed, he is bound by all its contents (*w*).

If a man agrees to purchase under limitations in a deed, which make it necessary upon that transaction for him to look into that deed, and that deed contains recitals of judgments affecting the lands he has so agreed to purchase; he is bound by those judgments, for he had a right to see the whole deed under which he purchased, and therefore must be taken to have seen the whole, and must consequently be presumed to have taken notice of every thing contained in it affecting his purchase (*x*).

(*v*) Bisco *v.* Earl of Banbury, 1 Cha. C. 287; Moore *v.* Bennett, 2 Cha. Ca. 246; Ferrars *v.* Cherry, 2 Vern. 384; Draper's Company *v.* Yardly, 2 Vern. 662; Mertins *v.* Joliffe, Ambl. 313; Bury *v.* Bury, Chancery, 11th July 1748, MS. Appendix, No. 25; and Coppin *v.* Fernyhough, 2 Bro. C. C. 291; S. P. *per* Lord Keeper Henley, in Howarth *v.* Powell, T. Vac. 1758, MS.; 1 Eden, 351, nom. Howorth *v.* Deem.

(*w*) Tanner *v.* Florence, 1 Cha. Ca. 259; Taylor *v.* Stibbert, 2 Ves. jun. 437; Hall *v.* Smith, MS. S.C.; 14 Ves. jun. 426; Daniels *v.* Davison, 16 Ves. jun. 249; which have overruled Philips *v.* Redhel, 2 Vern. 160, cited; where tenant for life sold as tenant in fee, and the very settlement at the time of the purchase was delivered to the purchaser himself; yet the Court would not affect the purchaser with the presumptive notice, but dismissed the bill.

(*x*) Hamilton *v.* Royse, 2 Sch. and Lef. 326, *per* Lord Redesdale.

So

So if an estate be subject to incumbrances, and be given by the owner in consideration of another estate given to him, the latter estate is subject in equity to the incumbrances charged at law on the former, and a purchaser, with notice of the transaction, is liable to the incumbrances although he had not notice of them. This was decided by Lord Redesdale, who considered it sufficient that the purchaser, by notice of the deeds, had notice of the equity although he had not notice of the particular incumbrance. This he said was an equity of which every purchaser under a settlement must have notice; for it is a clear rule, that a man cannot claim under a deed, and avoid the deed, he must submit to the whole; and he has notice of every thing of which the vendor had notice, so far as concerns that deed (*y*). This, it may be observed, was an opinion not intended to decide the case, although it was acquiesced in. It carries the rule much further, it is apprehended, than is warranted by either principle or authority.

But where a husband has not performed a marriage agreement on his part, he is not entitled to claim the benefit of it (*z*), and a purchaser from him of the consideration for the settlement by the wife, with notice of the deed, will be bound by the same equity as the husband was (*a*).

But the recital in a deed of a fact, which may or may not, according to circumstances, be held in a court of equity to amount to a fraud, will not, it seems, affect a purchaser for valuable consideration denying actual notice of the fraud (*b*). Nor will circumstances amounting to a *mere suspicion* of fraud be deemed notice thereof to a pur-

(*y*) Hamilton v. Royse, 2 Scho. and Lef. 315.

(*z*) Mitford v. Mitford, 9 Ves. jun. 87. See Bascoi v. Serra, 14 Ves. jun. 313.

(*a*) Harvey v. Ashley, 2 Scho. and Lef. 328, cited.

(*b*) Kenny v. Browne, 3 Ridgew. P. C. 512. See 17 Ves. jun. 293.

chaser. This question constantly arises in practice, on sales by tenant for life, and a child to whom he has appointed the estate under an exclusive power of appointment amongst his children. If there was any underhand agreement between the father and son, the power would be deemed fraudulently executed, and the other children might be relieved against it. The difficulty on the part of a purchaser is, to ascertain what circumstances, independently of a direct statement of the fact, are sufficient to fix the purchaser with presumptive notice of fraud. Lord Eldon has greatly relieved this difficulty by deciding, that the mere circumstance of the father first contracting to sell the estate, and then appointing to one child, who joins in the sale, will not affect the purchaser where the contract appears to have been fair, and the purchase money to have been paid to all the parties, and there is nothing to show that the son was not to receive a due proportion of the money (*c*).

Although a term assigned generally in trust to attend the inheritance is equally charged with the inheritance itself, yet such a trust is not of itself notice to a purchaser of any incumbrances; for it is notice of nothing, but that there is an inheritance to be protected, and that the term is attendant. It therefore gives notice to a purchaser of nothing but what he had notice of by the deeds making out the title to the fee.

But if in an assignment it be declared that the term is assigned to attend the inheritance, *as limited or settled by such a deed*, or to protect *the uses of such a settlement*, as is sometimes done, that will be notice of the deed or settlement, and consequently of all the uses of it, and the purchaser is bound to find them out at his peril (*d*).

(*c*) M'Queen *v.* Farquhar, 11 Ves. jun. 467; *vide supra*, p. 310.

(*d*) Willoughby *v.* Willoughby, 1 Term Rep. 763; 1 Collec. Juridica, 337.

It

It has been said that the court rolls are the title deeds of copyholds, and a purchaser is affected with notice of the court rolls as far back as a search is necessary for the security of the title (*e*). But this does not accord with the general rule as to judgments, registered deeds and the like, and would lead to great inconvenience in practice. It frequently happens, that purchasers of property of small value, accept the title of a great family under the last settlement, and it would be impossible to hold that they were bound by notice of the contents of the early deeds, if not referred to by the settlement. A purchaser of a copyhold estate is furnished with an abstract of the surrenders and admissions, and requires copies of the material ones; but, in point of fact, the court rolls are scarcely ever searched by a purchaser, and it has always been understood, in practice, that he is not bound by notice of their contents.

9. The better opinion seems to be, that being a witness to the execution of a deed will not of itself be notice; for a witness, in practice, is not privy to the contents of the deed (*f*).

This question has hitherto only occurred between a first mortgagee, who witnessed a second mortgage, and the second mortgagee; but it might arise between a purchaser who had, previously to his purchase, attested the execution of a deed relating to the estate, and the person in whose favour the deed was executed.

Lastly, it remains to consider, whether a purchaser is

(*e*) Pearce *v.* Newlyn, 3 Madd. 186.

(*f*) Mocatta *v.* Murgatroyd, 1 P. Wms. 393; Editor's and Cox's notes, *ibid.*; Welford *v.* Beezley, 1 Ves. 6; Beckett *v.* Cordley, 1 Bro. C. C. 357. See 1 Ves. jun. 55; and see Harding *v.* Crethorn, 1 Esp. Ca. 56; Holmes *v.* Custance, 12 Ves. jun. 279; Biddulph *v.* St. John, 2 Scho. and Lef. 521; Reed *v.* Williams, 5 Taunt. 257; 6 Dow, 224.

bound

bound to take notice of the mere construction of words which are uncertain in themselves, and often depend on the locality of them for the interpretation which they may receive.

This question arises where a settlement is made in pursuance of articles; but the estate is, contrary to the intention of the parties, limited so as to enable the parent to dispose of it. It is clear that the Court will rectify the settlement according to the intention, in favour of the issue, as between themselves, or as between themselves and persons claiming under the parent without consideration; but this has never yet been done against a purchaser (*g*).

In Senhouse *v.* Earle (*h*), Lord Hardwicke drew a distinction between ancient articles of this sort, and modern ones, and expressed his opinion, that in the case of ancient articles, the purchaser should not be disturbed; because modern methods of conveyancing were not to be construed to affect ancient notions of equity; but in case of notice of modern articles, he thought the Court ought to carry them into execution against a purchaser. But in a later case (*i*), Lord Northington seemed rather of opinion, that no relief should be granted against a purchaser; but this case is not satisfactory, as the language attributed to the Chancellor, on the principal question in that case, is by no means consistent with the prior cases on the subject.

Under these circumstances a purchaser cannot be advised to accept a title depending on a settlement made in pursuance of articles, but not framed according to the

(*g*) Warrick *v.* Warrick, 3 Atk. 291.

(*h*) Ambl. 285.

(*i*) Cordwell *v.* Mackrill, Ambl. 515; and see Hardy *v.* Reeves, 4 Ves. jun. 466; 5 Ves. jun. 426; Parker *v.* Brooke, 9 Ves. jun. 583; and Mathews *v.* Jones, 2 Anstr. 506.

general

general rules of equity (*k*); and, certainly, a court of equity would not enforce a purchaser to take such a title, although no relief might be granted to his prejudice if he actually had purchased.

III. Having endeavoured to show what will be deemed notice, either actual or constructive, we are now to inquire what will be sufficient proof of such notice.

It seems that the counsel, attorney or agent of the purchaser, cannot be admitted to prove notice.

In Maddox *v.* Maddox (*l*), the reading of the deposition of the agent of the purchaser, who swore, in proof of notice, that the deeds were laid before counsel, who made objections about the plaintiff's title, was objected to; but Lord Hardwicke said, that though an attorney or counsel concerned for one of the parties may, if he pleases, demur to his being examined as a witness, yet, if he consents, the Court will not refuse the reading his deposition. This objection, he added, had often been made; and though some particular judges had doubted, it was then always overruled. And, on investigation, it will, I believe, be found that Lord Hardwicke invariably adhered to this opinion. But it was settled before Lord Hardwicke's time (*m*), and has been the observed rule of the Courts ever since (*n*), that counsel and attornies ought not to be permitted to discover the secrets of their clients, though they offer themselves for that purpose; *and this is the*

(*k*) See Fearne's Posth. 315.

(*l*) 1 Ves. 62; and see Bishop of Winchester *v.* Fournier, 2 Ves. 445.

(*m*) Lord Say and Seal's case, 10 Mod. 41. See Lee *v.* Markham, Toth. 110; and Anon. Skin. 404.

(*n*) Lindsay *v.* Talbot, Bull. N. P. 284; Wilson *v.* Rastall, 4 Term Rep. 753; and see 2 Esp. N. P. 716; Wright *v.* Mayer, 6 Ves. jun. 280; Sloman *v.* Herne, 2 Esp. Ca. 695; Robson *v.* Kemp, 5 Esp. Ca. 52; Brand *v.* Ackerman, *ib.* 119; Rex *v.* Withers, 2 Camp. 578.

privilege

privilege of the client, not of the counsel or attorney (I); for it is contrary to the policy of the law to permit any person to betray a secret with which the law has intrusted him.

But a communication by mistake to a person not actually an attorney, although considered so by the person making it, is not protected (*n*); and an attorney may give evidence of the time of executing a deed, for a thing of such a nature cannot be called the secret of his client; it is a thing he may come to the knowledge of without his client's acquainting him, and is of that nature that an attorney concerned, or any body else, may inform the Court of (*o*).

So, if an attorney put his name to an instrument as a witness, he makes himself thereby a public man, and no longer clothed with the character of an attorney; his signature binds him to disclose all that passed at the time respecting the execution of the instrument; but not what took place in the preparation of the deed, or at any other time, and not connected with the execution of it. Every person who claims an interest in the property, has a right to call upon the attorney, as being the attesting witness (*p*); nor does this privilege extend to communications from collateral quarters, although made to him in consequence of his character of attorney; the privilege is restricted to communications, whether oral or written, from the client to his attorney (*q*).

If notice be only proved by one witness, a positive and express denial by the answer will prevent the Court from

(*n*) Fountain v. Young, 6 Esp. Ca. 113.

(*o*) Lord Say and Seal's case, 10 Mod. 41.

(*p*) Robson v. Kemp, 5 Esp. Ca. 52; Doe v. Andrews, Cowp. 845.

(*q*) Speneeley v. Schulenburgh, 7 East, 357.

(I) This was insisted upon in the reasons in Radcliffe v. Fursman, in the year 1730. See printed cases, *Dom. Proc.*

decreeing

decreeing against the answer (*r*): for, in equity, the general rule is, that if the answer contains a positive denial of the case stated in the bill, and it is contradicted by one witness only, there cannot be a decree against the defendant, unless the circumstances so preponderate, that greater credit, upon the testimonies of both being fairly balanced, must be given to the depositions of the witness, than to the answer of the defendant; laying aside all recollection that the oath of one of the parties is that of an interested person (*s*).

But where it is not a positive denial of the same fact, but admits of a difference, that it is only a denial with respect to himself, whereas, in other respects, it will equally affect him, there are several cases where the Court, on one undoubted witness, would decree against the answer; for instance, a person denying only personal notice, is a negative pregnant, that still there may be notice to his agent, which is a fact equally material (*t*).

And where the answer is not *ad idem*, the charge being positive, and the answer only to belief, which is not sufficient to contradict what is positively sworn, a single witness will be sufficient (*u*).

So where there are a great many concurring circumstances, that strengthen and support the depositions of a single witness, his evidence alone will enable the Court to decree against the answer (*x*).

(*r*) Alam v. Jourdon, 1 Vern. 161; 3 Cha. Ca. 123; Kingdome v. Boakes, Prec. Cha. 19; Mortimer v. Orchard, 2 Ves. jun. 243; and see Evans v. Bicknell, 6 Ves. jun. 174; 3 Cha. Ca. 123; Dawson v. Massey, 1 Ball and Beatty, 234; Cooke v. Clayworth, 18 Ves. 12.

(*s*) *Per* Lord Eldon, East India Company v. Donald, 9 Ves. jun. 275; 1 Smith, 213.

(*t*) See 1 Ves. 66; 3 Atk. 650.

(*u*) See 1 Ves. 97; and see Pilling v. Armitage, 12 Ves. jun. 78.

(*x*) Walton v. Hobbs, 2 Atk. 19; Anon. 3 Atk. 270; Only v. Walker, 3 Atk. 407; Pamber v. Mathers, 1 Bro. C. C. 52; East I. C. v. Donald, 9 Ves. jun. 275; 1 Smith, 213; and see 6 Ves. jun. 40; Biddulph v. St. John, 2 Scho. and Lef. 521.

If

If the evidence is not clear enough to enable the Court to make a satisfactory decree, it will be sent to law to be tried (*y*), unless the value of the property will not admit of it (*z*).

But the same rule that would absolutely prevent a decree from being made, will restrain the Court from directing an issue (*a*); for the matter is only referred to law, to know what a court of equity ought to do (*b*); and sending it to law to be tried, where the jury will certainly find it on the testimony of one witness, and then decreeing it on that verdict, is the same thing as decreeing on one witness, without trying it at all (*c*).

Formerly, however, an issue used to be directed, although upon the evidence a decree could not be made (*d*); and in such cases the defendant's answer was directed to be read at the trial, not as evidence, for that could not be, nor was it to be admitted to be true, but to be sworn, so that the defendant might have the benefit of his oath at law as well as in equity, if it would have any weight with the jury. But this could only be done where it was merely oath against oath (*e*); and as an issue would not now be directed in such a case, the answer of the defendant cannot, it should seem, at the present day, be directed to be read at a trial at law. But if a bill is filed for a discovery only, the answer of the defendant may of course be read on the trial (*f*).

It must be remarked, that if the notice arise, by con-

(*y*) Arnot *v.* Biscoe, 1 Ves. 95.

(*z*) Jolland *v.* Stainbridge, 3 Ves. jun. 478.

(*a*) Pember *v.* Mathers, 1 Bro. C. C. 52.

(*b*) See 1 Bro. C. C. 53, 54; 9 Ves. jun. 264; 1 Smith's Rep. 219.

(*c*) See 1 Eq. Ca. Abr. 229, pl. 13.

(*d*) Stadd *v.* Cason, Toth. 230; Ibbotson *v.* Rhodes, 2 Vern. 554; 1 Eq. Ca. Abr. 229, pl. 13, S. C.; Cant *v.* Lord Beauclerk, 3 Atk. 408, cited; *sed vide* Christ College *v.* Widdrington, 2 Vern. 283.

(*e*) Only *v.* Walker, 3 Ath. 407.

(*f*) See 9 Ves. jun. 262; 1 Smith, 218.

struction

struction of equity, on a deed which is in the possession of the purchaser (*g*), and he contend that it did not come into his custody till after the completion of his purchase, the proof thereof will lie on him (*h*).

In one case (*i*), however, although the only evidence of the deed being in the possession of the defendant, was the discovery in his answer, and on the deed being produced the counsel offered to read the answer, to show that it had not been delivered to him till lately, and long after he had purchased the estate, Lord Hardwicke refused it, although it was argued to be very hard; because the only account of the delivery of the deed was in the answer; and by its not being permitted to be read, the deed must be taken to be in his custody at the time of the purchase, ten years before it actually was.

But it seems, that the defendant had sufficient notice, besides the mere custody of the deed. His conveyance recited all the former deeds; and therefore reading the answer, to prove when the deed in question came into his custody, was perfectly unnecessary. This case, therefore, cannot be deemed subversive of the general rule.

(*g*) See 1 Ves. 392.
(*h*) See 2 Ves. 486.
(*i*) Mertins *v.* Joliffe, Ambl. 311.

CHAPTER XVIII.

OF PLEADING A PURCHASE.

"SUPPOSING a plaintiff to have a fair title to the relief he prays, and the defendant can set up no defence in bar of that title, yet if the defendant has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the Court to assert his right, the Court will not interfere on either side. This is the case where the defendant claims under a purchase for valuable consideration, without notice of the plaintiff's title, which he may plead in bar of the suit (*a*)."

The principle of this plea, Lord Eldon observes, is this: "I have honestly and *bonâ fide* paid for this estate, in order to make myself the owner of it; and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bonâ fide* (*b*)."

This plea is a peremptory plea, and must be sworn by the pleader (*c*). It must be put in *ante litem contestatam*, because it is a plea why an answer should not be put in; and, therefore, if a defendant answers to any thing to which he may plead, he overrules his plea (*d*), but he may answer any thing *in subsidium* of his plea, as he may deny

(*a*) Mitford on Pleading, 2d ed. p. 215; Gough v. Stedman, Finch, 208.

(*b*) See Wallwyn v. Lee, 9 Ves. jun. 24.

(*c*) Marshall v. Frank, Prec. Cha. 480.

(*d*) Richardson v. Mitchell, Sel. Cha. Ca. 51; Blacket v. Langlands, 1 Anstr. 14.

notice

notice in his answer, which he may deny also in his plea; because that is not putting any thing to issue which he should cover by his plea from being put in issue, but it is adding, by way of answer, that which will support his plea, and not an answer to a charge in the bill, which, by the plea, he would decline (*e*).

The plea must state the deeds of purchase, setting forth the dates, parties and contents briefly, *and the time of their execution* (I), for that is the peremptory matter in bar (*f*) (II).

It must aver that the vendor was seised, or pretended to be seised at the time he executed the conveyance (*g*). In Carter *v.* Pritchard (*h*) it was held, that the plea of a purchase, without notice, must aver the defendant's *belief*, that the person from whom he purchased was seised in fee. If it be charged in the bill that the vendor was only tenant for life, or tenant in tail, and a discovery of the title be prayed, such a discovery cannot be covered, unless a seisin is sworn in the manner already mentioned, or that such fines and recoveries were levied and suffered as would bar an entail if the vendor was tenant in tail; for if a purchase

(*e*) Gilb. For. Rom. 58. See Hoare *v.* Parker, 1 Bro. C. C. 573.

(*f*) See Gilb. For. Rom. 58; Aston *v.* Aston, 3 Atk. 302; and 2 Ves. 107. 396; and see Wallwyn *v.* Lee, 9 Ves. jun. 24.

(*g*) Story *v.* Lord Windsor, 2 Atk. 630; Head *v.* Egerton, 3 P. Wms. 279; and see 17 Ves. jun. 290.

(*h*) Michael. Term, 12 Geo. II. 1739; 2 Vivian's MS. Rep. 90, in Lincoln's Inn Library.

(I) *Qu.* this, as the plaintiff might thereby be enabled to proceed against the defendant at law. See Anon. 2 Cha. Ca. 161. In Day *v.* Arundel, Hard. 510, it was expressly held, that the time of the purchase need not be stated in the plea.

(II) It seems, that the practice formerly was, to extend the plea to the discovery even of the purchase deeds; and in Watkins *v.* Hatchet, 1 Eq. Ca. Abr. 33, pl. 3, although the purchaser improvidently offered to produce his purchase deed, yet the Court would not bind him to do so.

by lease and release should be set
no more from the tenant in tail th
and that is only an estate for t
tail (I), then there is no bar again
however, a fine is pleaded, the p
seisin of a freehold in the vendo
seised, or pretended to be seised (

If the conveyance pleaded be o
the plea must aver that the ven
the time of the execution of the
it be of a particular estate, and n
set out how the vendor became ent
But although a bill be brought b
not, on that account, aver the p
plaintiff's ancestor (*n*).

The plea must also distinctly
tion money, mentioned in the d
truly paid (*o*), independently of th
deed (*p*); for if the money be no
overruled (*q*), as the purchaser is
payment of it (*r*). The partic

(*i*) Gilb. For. Rom. 57. Fre
(*k*) Story *v.* Lord Windsor, 2 Cha
Atk. 630; and see Page *v.* Lever, (
2 Ves. jun. 450; Dobson *v.* Lead- 34.
beater, 13 Ves. jun. 230. (
(*l*) Trevanian *v.* Mosse, 1 Vern. 814
246; and see 3 Ves. jun. 226; and (
9 Ves. jun. 32. Atk
(*m*) Hughes *v.* Garth, Ambl. 421. (
(*n*) Seymour *v.* Nosworth, 2

(I) This is the doctrine of Littleton,
agrees; but since Littleton's time it has b
a base fee determinable by the entry or ac
n. (1) to Co. Litt. 331, a. and the authorit

it should seem, be stated (*s*), although this point has been decided otherwise (*t*). There can, however, be no objection to state the consideration, as, if it be valuable, the plea will not be invalidated by mere inadequacy (*u*). The question is not, whether the consideration is adequate, but whether it is valuable? for if it be such a consideration as will not be deemed fraudulent within the statute of 27th Elizabeth, or is not merely nominal (*x*), or the purchase is such a one as would hinder a *puisne* purchase from overturning it, it ought not to be impeached in equity.

The plea must also deny notice of the plaintiff's title or claim (*y*), previously to the execution of the deeds and payment of the purchase money (*z*); for till then the transaction is not complete; and, therefore, if the purchaser have notice previously to that time, he will be bound by it (*a*). And the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title (*b*). But a denial of notice at the time of making the purchase, and paying the purchase money, is good; and notice *before* the purchase need not be denied, because notice before is notice at the time of the purchase, and the party will, in such case, on its being made appear

(*s*) Millard's case, 2 Freem. 43; and Snag's case, cited *ibid.*; and see Wagstaff *v.* Read, 2 Cha. Ca. 156.

(*t*) More *v.* Mayhow, 1 Cha. Ca. 34; Day *v.* Arundell, Hard. 510.

(*u*) Basset *v.* Nosworthy, Finch, 102; Ambl. 767; Mildmay *v.* Mildmay, Ambl. 767, cited; Bullock *v.* Sadlier, Ambl. 764.

(*x*) See More *v.* Mayhow, 1 Cha. Ca. 34; Wagstaff *v.* Read, 2 Cha. Ca. 156.

(*y*) Lady Bodmin *v.* Vendebendy, 1 Vern. 179; Anon. 2 Ventr. 361, No. 2.

(*z*) More *v.* Mayhow, 1 Cha. Ca. 34; Story *v.* Lord Windsor, 2 Atk. 630; Attorney-General *v.* Gower, 2 Eq. Ca. Abr. 685, pl. 11.

(*a*) *Vide supra*, p. 708.

(*b*) Kelsall *v.* Bennett, 1 Atk. 522; which has overruled Bramton *v.* Barker, 2 Vern. 159, cited.

that he had notice before, be liable to be convicted of perjury (*c*).

The notice must be positively, and not evasively denied (*d*), and must be denied, whether it be or be not charged by the bill (*e*). If particular instances of notice, or circumstances of fraud, are charged, the facts from which they are inferred must be denied as specially and particularly as charged (*f*).

Notice must also be denied by answer, for that is matter of fraud, and cannot be covered with the plea, because the plaintiff must have an opportunity to except to its sufficiency if he think fit (*g*); but it must also be denied by the plea, because otherwise there is not a complete plea in court on which the plaintiff may take issue (*h*).

Although a purchaser omit to deny notice by answer, he will be allowed to put in the point of notice by way of answer (*i*), and the omission will not invalidate his plea, if it is denied by that (*k*). If notice is omitted to be denied by the plea, and the *plaintiff reply to it*, the defendant has then only to prove his purchase, and it is not material if the plaintiff do prove notice, as he has waved setting down the plea for argument, in which case it would have been overruled (*l*). If, however, a bill is exhibited

(*c*) Jones *v.* Thomas, 3 P. Wms. 243.

(*d*) Cason *v.* Round, Prec. Cha. 226; and see 2 Eq. Ca. Abr. 682, (D.) n. (b).

(*e*) Aston *v.* Curzon, and Weston *v.* Berkely, 3 P. Wms. 244, n. (*f*); and see the 6th resol. in Brace *v.* Duke of Marlborough, 2 P. Wms. 491.

(*f*) Meder *v.* Birt, Gilb. Eq. Rep. 185; Radford *v.* Wilson, 3 Atk. 815; and see Jerrard *v.* Saunders, 2 Ves. jun. 187; 4 Bro. C. C. 322; 6 Dow, 230.

(*g*) Anon. 2 Cha. Ca. 161; Price *v.* Price, 1 Vern. 185.

(*h*) Harris *v.* Ingledew, 3 P. Wms. 91; Meadows *v.* Duchess of Kingston, Mitf. on Plead. 2d edit. 216, n.

(*i*) Anon. 2 Cha. Ca. 161.

(*k*) Coke *v.* Wilcocks, Mose. 73.

(*l*) Harris *v.* Ingledew, 3 P. Wms. 91; Eyre *v.* Dolphin, 2 Ball and Beat. 302.

against

against a purchaser, and he plead his purchase, and the bill is thereupon dismissed, a new bill will lie charging notice, if the point of notice was not charged in the former bill, or examined to; and the former proceedings cannot be pleaded in bar (*m*). But if notice is neither alleged by the bill nor proved, and the defendant by his answer deny notice, an inquiry will not be granted for the purpose of affecting him with notice (*n*).

If a purchaser's plea of valuable consideration without notice be falsified by a verdict at law, and thereupon a decree is made against the purchaser, and he then carries an appeal to the House of Lords, it will be dismissed, and the decree affirmed without further inquiry (*o*).

The title of a purchaser for valuable consideration without notice is a shield to defend the possession of the purchaser (*p*), not a sword to attack the possession of others (*q*). It is clear that it will protect his possession from an equitable title, although even that has been sometimes questioned (*r*); whether it will avail against a legal title, is perhaps doubtful.

In Burlase *v.* Cooke (*s*), Lord Nottingham held the plea to be good against a legal estate; but in the subsequent case of Rogers *v.* Seale (*t*), he is reported to have been of a different opinion, and to have decreed accordingly. But unfortunately both these cases appear to be very ill reported.

In Parker *v.* Blythmore (*u*), the Master of the Rolls thought the plea good against a legal estate.

(*m*) Williams v. Williams, 1 Cha. Ca. 252.

(*n*) Hardy v. Reeves, 5 Ves. jun. 426.

(*o*) Lewes v. Fielding, Colle's P. C. 361.

(*p*) Patterson v. Slaughter, Amb. 292.

(*q*) See 3 Ves. jun. 225.

(*r*) See 1 Ball and Beatty, 171.

(*s*) 2 Freem. 24.

(*t*) 2 Freem. 84.

(*u*) 2 Eq. Ca. Abr. 79, pl. 1.

But in Williams *v.* Lambe (*x*), upon a bill filed by a dowress against a *bonâ fide* purchaser, without notice of the marriage, Lord Thurlow overruled the plea. He said, that the only question was, whether a plea of purchase without notice would lie against a bill to set out dower; that he thought where the party is pursuing a *legal title*, as dower is, the plea did not apply, it being only a bar to an *equitable*, not to a *legal* claim.

In a later case (*y*), Lord Rosslyn considered it impossible that Rogers *v.* Seale could be the decision of Lord Nottingham, and decreed that the plea could stand against a legal as well as an equitable title.

Lord Rosslyn did not, however, mention the case of Williams *v.* Lambe, which is against the doctrine he laid down; nor, indeed, did he notice the case of Parker *v.* Blythmore, which is in favour of it. It is much to be lamented that all the authorities were not considered.

To argue from principle, it seems clear that the plea is a protection against a legal as well as an equitable claim; and as the authorities in favour of that docrine certainly preponderate, we may, perhaps, venture to assert, that it will protect against both.

(*x*) 3 Bro. C. C. 264.

(*y*) Jerrard *v.* Saunders, 2 Ves. jun. 454.

APPENDIX.

No. I.

Notice by the Owner and his Agent, of the Agent's intention to bid (*a*).

SIR,

I, THE undersigned *A*, of owner of the estates intended to be sold by you at by public auction, on the day of next, do hereby give you notice, that I have appointed the undersigned *B*, of, &c. to bid on my behalf, or for my use, at the same sale. And I, the above-named *B*, do hereby give you notice, that I have accordingly agreed to bid at such sale, for the use of the said *A*.

To Mr. Auctioneer.

No. II.

Notice by the Agent of his intention to bid (*b*).

SIR,

I, the undersigned *A*, of, &c. agent of *B*, of, &c. owner of the estates intended to be sold by you at by public auction, on the day of next, do hereby give you notice, that I intend to bid at the same sale, on the behalf, or for the use of the above-named *B*.

To Mr. Auctioneer.

No. III.

Notice by the Agent, and the Person appointed by him, of such Person's intention to bid (*c*).

SIR,

I, the undersigned *A*, of, &c. agent of *B*, of, &c. owner of the estates intended to be sold by you at by public auction,

(*a*) *Vide supra*, p. 16. (*b*) *Vide supra*, p. 16. (*c*) *Vide supra*, p. 16.

on the day of next, do hereby give you notice, that I have appointed the undersigned *C*, of, &c. to bid at the same sale, on the behalf, or for the use of the above-named *B*. And I, the said *C*, do hereby give you notice, that I have accordingly agreed to bid at such sale, for the use of the said *B*.

To Mr. Auctioneer.

No. IV.

Conditions of Sale (*d*).

I. That the highest bidder shall be the buyer: and if any dispute arise as to the last or best bidder, the lot in dispute shall be put up at a former bidding.

II. That no person shall advance less at any bidding than ....*l.* (I); or retract his or her bidding (*e*).

III. That every purchaser shall immediately pay down a deposit in the proportion of ....*l.* for every 100 *l.* of his or her purchase money, into the hands of the *auctioneer* (II); and sign an agreement for payment of the remainder to the proprietor, on the day of next, at at which time and place the purchases are to be completed, and the respective purchasers are then to have the actual possession of their respective lots; all outgoings to that time being cleared by the vendor.

IV. That within from the day of the sale, the vendor shall, at his own expense, prepare and deliver an abstract of his title to each purchaser, or his or her solicitor; and shall deduce a good title (III) to the lots sold.

V. That upon payment of the remainder of the purchase money at the time above-mentioned, the vendor shall convey the lots to the respective purchasers: each purchaser, at his or her own expense, to prepare the conveyance to him or her; and to

(*d*) *Vide supra*, p. 26.

(*e*) Payne *v.* Cave, 3 Term Rep. 148. *Vide supra*, p. 36. This has now become an usual condition.

(I) Or thus, "than such sum as shall be named by the auctioneer at the time."

(II) This is scarcely ever done in the country; but the deposits are paid to the agent of the vendor.

(III) Where the estate is leasehold, and the vendor cannot produce the lessor's title, this condition should go on thus: "to the lease granted of the premises; but the purchaser shall not be entitled to require, or call for the title of the lessor." *Vide supra*, p. 32.

tender

tender or leave the same at for execution by the vendor (*f*).

VI. That the auction duty of 7*d*. in the pound shall, immediately after the sale, be paid to the auctioneer by the vendor and purchaser, in equal moieties (*g*) (I).

VII. That if any of the purchasers shall neglect or fail to comply with the above conditions, his or her deposit money shall be actually forfeited to the vendor, who shall be at full liberty to resell the lot or lots bought by him or her, either by public auction or private contract; and the deficiency (if any) occasioned by such second sale, together with all expenses attending the same, shall, immediately after the same sale, be made good to the vendor by the defaulter at this present sale: and in case of the nonpayment of the same, the whole thereof shall be recoverable by the vendor, as and for liquidated damages (*h*), and it shall not be necessary to previously tender a conveyance to the purchaser.

Lastly, That if any mistake be made in the description of the premises, or any other error whatever shall appear in the particulars of the estate, such mistake or error shall not annul the sale, but a compensation, or equivalent, shall be given or taken, as the case may require (*i*). Such compensation or equivalent to be settled by two referees, or their umpire; each party within ten days after the discovery of the error, and notice thereof given to the other party, to appoint one referee by writing; and in case either party shall neglect or refuse to nominate a referee within the time appointed, the referee of the other party alone may make a final decision. If two referees are appointed, they are to nominate an umpire before they enter upon business, and the decision of such referees or umpire (as the case may be), shall be final.

Condition to be inserted where the Title-deeds cannot be delivered up (*k*).

That as the title-deeds which concern this estate relate to other estates of greater value, the vendor shall retain the same in his custody, and enter into the usual covenants (to be pre-

(*f*) *Vide supra*, p. 33.
(*g*) *Vide supra*, p. 36.
(*h*) *Vide supra*, p. 34.
(*i*) *Vide supra*, p. 35.
(*k*) *Vide supra*, p. 31, 32.

(I) This condition should be omitted where the estate is sold by assignees of a bankrupt. *Vide supra*, p. 13, 14.

pared

pared by his solicitor, and at his expense) for the production of them to the respective purchasers: but all attested copies which may be required of such deeds, shall be had and made at the expense of the person requiring the same.

Where an Estate is intended to be sold in Lots, and the Title-deeds are to be delivered up, the following Condition may be inserted:

That as the aforesaid lots are holden under the same title, the purchaser of the greater part in value of the said estate, shall have the custody of the title-deeds, upon his entering into the usual covenants for the production thereof to the purchaser or purchasers of the remaining or other lots: If the largest portion in value of the estate shall remain unsold, the seller shall be entitled to retain the deeds upon entering into such covenants as aforesaid; all such covenants to be prepared by and at the expense of the person or persons requiring the same; who may have attested copies of such deeds at his, her or their own expense.

Or this:

That the title-deeds shall be retained by the vendor, until all the estates now offered for sale shall be sold, when they shall be delivered over to the largest purchaser, upon his entering into the usual covenants for the production thereof to the other purchasers; such covenants to be prepared by and at the expense of the person or persons requiring the same. Whilst the deeds remain in the seller's hands, he shall produce them to the several purchasers when required, and every purchaser may at any time have attested copies of the deeds at his own expense.

Where the Property is considerable, it may be advisable to make a stipulation as to the expense of the attested copies according to the value of the lots. As, for instance:

That all attested copies of the title-deeds shall be made and delivered at the expense of the person requiring the same, unless his or her purchase money exceeds ....*l.* but does not amount to ....*l.*; in which case the vendor shall furnish the attested copies of all such deeds and writings as shall be deemed necessary, according to professional usage, at the joint expense of him and the purchaser; and if the purchase money exceeds ....*l.* the vendor shall furnish the same at his own expense.

No. V.

Agreements to be signed by the Vendor and Purchaser after Sales by Auction (l).

It seems advisable to have two sets of conditions, at the end of one of which may be printed an agreement for the auctioneer, or agent of the vendor, to sign; and at the end of the other may be printed an agreement for the purchaser to sign.

The Agreement to be signed by the auctioneer, or agent of the vendor, may be thus:

I do hereby acknowledge, that has been this day declared the purchaser of lot of the estates mentioned in the above-written particulars, at the sum of ....*l.*; and that he has paid into my hands ....*l.* as a deposit, and in part payment of the said purchase money; and I do hereby agree, that the vendor shall, in all respects, fulfil on his part, the above-written conditions of sale. As witness my hand, this day of

Purchase money - - - - £.
Deposit money - - - -

Remainder unpaid - - £.

Witness,

The purchaser may sign the following Agreement:

I do hereby acknowledge, that I have this day purchased by public auction, lot of the estates mentioned in the above-written particulars, for the sum of ....*l.*; and have paid into the hands of the sum of ....*l.* as a deposit and in part payment of the said purchase money; and I do hereby agree to pay the remaining sum of ....*l.* unto at on or before the day of and in all other respects, on my part, to fulfil the above-written conditions of sale. As witness my hand, this day of

Purchase money - - - - £.
Deposit money - - - -

Remainder unpaid - - £.

Witness,

(l) *Vide supra*, p. 43.

No. VI.

Agreement for Sale of an Estate by Private Contract (*m*).

Articles of agreement made and entered into this day of between *A*, of, &c. for himself, his heirs, executors and administrators, of the one part, and *B*, of, &c. for himself, his heirs, executors and administrators, of the other part, as follow: viz.

The said *A* doth hereby agree with the said *B* to sell to him the messuages, &c. (*parcels*) with their appurtenances, at or for the price or sum of ....*l.*: and that he the said *A* will within one month from the date hereof, at his own expense, make and deliver unto the said *B*, or his solicitor, an abstract of the title of him the said *A* to the said messuages and premises; and will also, at his own expense, deduce a clear title thereto. And also that the said *A*, or his heirs, and all other necessary parties, shall and will, on or before the day of next, on receiving of and from the said *B*, his executors or administrators, the said sum of ....*l.* at the costs and charges of him the said *B*, his heirs, executors, administrators or assigns, execute a proper conveyance, for conveying and assuring the fee simple and inheritance of and in all the said messuages and premises, with their appurtenances, unto the said *B*, his heirs or assigns, free from all incumbrances.

And the said *B* hereby agrees with the said *A*, that he the said *B*, his heirs, executors, administrators or assigns, shall and will, on the execution of such conveyance as aforesaid, pay the sum of ....*l.* unto the said *A*, his executors or administrators.

And it is hereby further agreed by and between the said *A* and *B* as follows: viz.

That the conveyance shall be prepared by and at the expense of the said *B*, and that the same shall be settled and approved of on the parts of the said *A* and *B* by their respective counsel; and that each of them, the said *A* and *B*, shall pay the fees of his own counsel.

And that all rates, taxes and outgoings, payable for or in respect of the premises to the day of shall be paid and discharged by the said *A*, his executors or administrators.

And lastly, that if the said *A* shall not deliver an abstract of

(*m*) *Vide supra*, p. 43.

his

his title to the said *B*, or his solicitor, before the expiration of one calendar month from the date hereof, or shall not deduce a good and marketable title to the said messuages and premises, before the said day of then and in either of the said cases, immediately after the expiration of the said one calendar month, or the said day of (as the case may be), this present agreement shall be utterly void to all intents and purposes whatsoever, and the jurisdiction of equity wholly barred; it being the true intent and meaning of the parties hereto, that in the event aforesaid execution of this agreement shall not be enforced by any court of equity, notwithstanding any rule (if such there be) that time cannot be made the essence of a contract, or any other rule or maxim whatsoever (*n*). In witness, &c.

A provision may also be inserted in agreements, making time the essence of the contract, in case the purchase money is not paid at the day appointed; but clauses making agreements void if a title is not made, or the purchase money paid by a stated time, should never be inserted unless it be the express intention of the parties. Where time is not deemed material, clauses to the following effect should be inserted:

That the said *B* and his heirs shall have, receive and take the rents and profits of the said messuages and premises, from the day of next, for his and their proper use.

And that if the said conveyance shall not be executed by the necessary parties, and the said purchase money paid on or before the said day of then and in such case the said *B*, his heirs, executors or administrators, shall from the same day of pay interest for the said purchase money unto the said *A*, his executors or administrators, after the rate of *per cent. per ann.*

No. VII.

Bratt v. *Ellis* (*o*), *C. B. Mich. and Hil. Terms, 45 Geo. III.*

John Goodwin being indebted to Ellis, the defendant, an auctioneer, deposited the title-deeds of some houses with him, as a security; and gave him a written authority to sell them by auction, at any time before Midsummer 1803. They were

(*n*) *Vide supra*, ch. 8, sect. 2. (*o*) *Vide supra*, p. 37.

accordingly

accordingly put up at Garraway's; and not fetching the sum expected, they were bought in by Goodwin. Ellis not being paid, put up the houses again in September 1804, under the usual conditions. The plaintiff was declared the highest bidder at 315 *l.*; paid a deposit of 75 *l.* and signed an agreement to complete the contract. The defendant delivered possession to the plaintiff, who expended about 10 *l.* in repairs; and the defendant sent the deeds to the plaintiff's attorney, who approved of the title, and prepared a conveyance; and the defendant undertook to procure Goodwin to attend and execute the deed. Goodwin, however, upon being applied to, refused to complete the contract, which was made without his authority. The plaintiff brought the present action to recover the deposit money and interest, and the expense of perusing the abstract, preparing the conveyance, &c.; and the damages the plaintiff had sustained by losing such a good bargain. The plaintiff gave 315 *l.* for the houses, and a surveyor, examined on his behalf, proved that they were worth 751 *l.* The defendant suffered judgment to go by default. Upon the execution of the writ of inquiry of damages, the defendant's counsel admitted, that he was liable to repay the deposit, with interest, and fair expenses incurred in investigating the title, &c. But as it appeared by the declaration that the defendant was only an auctioneer, and Goodwin was the owner, he insisted that the defendant was not answerable for the difference of value. The sheriff, in his charge to the jury (which was specially summoned), said, it was admitted on all hands, that the deposit and interest, and expenses, must be paid to the plaintiff. With respect to the demand for the loss of the bargain, he thought, that the demand was recoverable; for the defendant had admitted that he had sold the property without authority; but the amount of the damages was in their discretion. They would consider whether it would have sold for 751 *l.* If they believed the surveyor, it would be quite competent to give the whole, or what they pleased. The jury returned a verdict for 350 *l.* being upwards of 250 *l.* as damages for loss of the bargain. The Court of Common Pleas, however, granted a rule to show cause, why the writ of inquiry should not be set aside, and the defendant let in to plead in the action, upon paying into Court the deposit money, and interest, and on payment by the defendant to the plaintiff of his costs occasioned thereby, together with his costs of the present application. Upon showing cause, the Court made the rule absolute; on

payment

payment to the plaintiff of the deposit, with interest, the costs of investigating the title, and the costs of the action, *as between attorney and client.*

No. VIII.

Jones v. *Dyke and others* (*p*), *Hereford summer assizes, cor. Macdonald, C. B.*

The circumstances of the case were shortly these. Some estates in Wales having been advertised for sale, the plaintiff came to town, and after some treaty with the defendants, who were the auctioneers employed, he agreed to purchase the estate in question, at 975*l.* and it was agreed that he was to pay the deposit in nine days, and to give his note for it at that date, which he accordingly did. Tuchin, one of the defendants, by the desire of his partner Dyke, gave the plaintiff a receipt for the deposit, and signed a printed particular, which together amounted to an agreement in writing.

In a few hours after this transaction, Dyke and Tuchin called on a friend of the plaintiff's to acquaint him that they had just received a letter from Wales, stating that the estates were sold for more money, and requesting the particular and receipt to be returned; and the plaintiff refusing to relinquish the agreement, and having immediately returned to Wales, they by the next post sent to him his note of hand, and a particular signed by him, both of which he instantly returned.

The 100*l.* was tendered in payment of the note, and refused: the residue of the purchase money was prepared in time, and deposited at a banker's.

The plaintiff filed a bill in equity against the owner of the estate, and his trustees for sale, who denied the authority of the defendants to sell, in consequence of which the plaintiff was advised to dismiss his bill.

The plaintiff then brought an action against the defendants, in which he proved by two witnesses that the estate purchased was worth 2,117*l.* 10*s.* so that he lost upwards of 1,140*l.* by breach of the agreement.

It appearing that the defendants had no authority to sell, the plaintiff had a verdict by consent, for 261 *l.* the Judge thinking

(*p*) *Vide supra*, p. 37.

the

the items of which that sum was composed reasonable, but the plaintiff did not obtain any damages for the loss of his bargain.

The sum of 261 *l.* was thus made up:	£.	s.	d.
Costs of the plaintiff's solicitor - - - - - - -	47	19	4
Costs of the trustees in equity, about - - - - -	30	-	-
Interest of 975 *l.* from April 1804 to April 1807 -	146	5	-
Journies to London and Llandilo, about 20 days, horse-hire and travelling expenses - - - - -	21	-	-
Journey to London - - - - - - - - - - -	15	15	-
	£. 260	19	4

No. IX.

Wyatt v. *Allan* (*q*), *Reg. Lib. B.* 1777, *fol.* 576.

The bill was filed by Wyatt, charging that he, as agent for the defendant Allan, purchased an estate by auction, but that the defendant having denied the commission, he himself was forced to complete the purchase. The purchase money was 435 *l.* The defendant by his answer denied that he employed the plaintiff to purchase the estate.

The Chancellor directed an issue to try the fact, and that if the jury found that an authority was given by Allan, they should indorse on the postea to what amount such authority extended. The jury found that Allan did give an authority to the extent of 400 *l.* Upon the cause coming back on the equity reserved, the defendant was ordered to pay the plaintiff the 400 *l.* and the plaintiff was to assign the estate, and the defendant was to pay the costs both at law and in equity.

No. X.

Sir John Morshead and others v. *Frederick* (*r*) *and others.*
Ch. 20th February 1806.

Certain estates of the late Sir John Frederick were devised to trustees upon trust, by mortgage or sale thereof to raise 34,000 *l.* for the benefit of his two daughters, Lady Morshead and Miss Thistlethwayte. Part of this estate consisted of a house in the

(*q*) *Vide supra*, p. 38. (*r*) *Vide supra*, p. 61.

occupation

occupation of Smith, Payne and Smith, the bankers. In 1751, a ground lease of this house was granted for sixty-one years, at 56 *l.* a year. The representative of the lessee assigned the lease to Smith and Company, subject not only to the original ground rent of 56 *l.* a year, but also to an additional rent of 210 *l.* A bill was filed for carrying the trusts of Sir John Frederick's will into execution. With the approbation of all parties, the house in question was offered for sale, and represented as subject to the grouhd lease at 56 *l.* a year. Smith and Company employed an auctioneer to enter into a treaty with the plaintiff's solicitors for the purchase of the house, and he was informed by them that it was subject to the lease at 56 *l.* a year. The auctioneer valued the house as being subject to the lease, and to no other rent, charge, or incumbrance, at 6,150 *l.* and verbally agreed with the plaintiff's solicitors for the purchase by Smith and Company of the house at that sum: the contract was referred to the Master, who approved of it, and by an order in the cause, Smith and Company were directed to pay the purchase money into Court, to the credit of the cause, and it was ordered that they should be let into receipt of the rents from the last quarter day. The title was approved of on behalf of the purchasers, and the money was paid into the bank according to the order. A few months afterwards, and before the conveyance was executed, application was made to Smith and Company for payment of the rent of 210 *l.* to the person entitled to it. Upon this, Smith and Company insisted upon an abatement in the purchase money, which the plaintiffs would not accede to. A motion was then made to the Court by Smith and Company, that the money paid into the bank might be repaid to them, and the contract for the purchase of the house rescinded. In support of this motion, the auctioneer swore, that he valued the house as subject to the 56 *l.* a year only, and that he was ignorant of its being subject to any other rent or outgoing. The solicitor for Smith and Company swore, that no notice was taken in the abstract of the lease, by which the 210 *l.* a year was reserved. One of the bankers swore, that when the money was paid into the bank, and when the valuation was made, he and his partners believed that the auctioneer had been made fully acquainted with all the charges, whether consisting of rents or otherwise, which in any ways affected the house; and that his not being made acquainted with the rent of 210 *l.* was occasioned by some undesigned omission or mistake.

In opposition to these affidavits, the solicitor of the plaintiffs swore, that he had been in receipt of the rent of 56*l.* a year nearly thirty years, which had been paid by Smith and Company since 1797, and that he had never heard that the house was ever granted by any under lease, or was made subject to any other rent than the rent of 56*l.* until long after the sale to the bankers. And that upon inquiry he found, *that the rent of* 210*l. had been paid by the bankers themselves ever since they purchased the lease.*

The motion came on before Lord Eldon, who expressed an opinion in favour of the purchaser's right to rescind the contract, but did not decide the point. It afterwards came before Lord Erskine, who held this to be a proper case for the interference of equity, on the ground of *mistake*, and accordingly granted the motion. The circumstance of both rents being payable by the purchasers, his Lordship thought immaterial, as it appeared, that they had not communicated that circumstance to their broker, and the magnitude of their concerns might easily account for the omission. It could not be imagined, that any man would willingly conceal such a fact from a broker employed by him to value any property he wished to purchase; and it was equally absurd to suppose, that if a broker, in valuing any property, was ignorant of the existence of an additional rent of 200*l.* no relief lay against such a mistake in a court of equity.

No. XI.

Ex parte Tomkins (*s*), *L. I. Hall, 23d August* 1816.

A mortgagee obtained an order for sale of the estates under a bankruptcy. The assignees, without leave of the Court, appointed several puffers to bid, and two lots were knocked down to them. Lord Eldon determined that they must be held to their bargain, although they swore that they believed there was no real bidder. And in answer to an application, that if there should prove to be a real bidder, the assignees might only be compelled to pay the price which he bid, the Lord Chancellor said, that although it was a hard case, they must pay the sum at which the lots were knocked down. The order was for a

(*s*) *Vide supra*, p. 62.

sale,

sale, and they were not authorized to buy the estate in; their biddings might have prevented the estate from selling to a *bonâ fide* bidder, and it was impossible for the Court to say that the estate would not have fetched more than the last real bidding, if the puffer appointed by the assignees had not afterwards bid. A majority of the creditors in such a case could not bind the rest, and if assignees choose to act, they ought to procure an indemnity from the creditors.

No. XII.

Observations on the Annuity Act (t).

To this passage a note was added in a former edition, in which it was contended, that the 17 Geo. III. c. 26, commonly called the Annuity Act, extended to money considerations only, notwithstanding the case of Crosly *v.* Arkwright, 2 Term Rep. 603. The authorities relied on, were Crespigny *v.* Wittenoom, 4 Term Rep. 790; Hutton *v.* Lewis, 5 Term Rep. 639; *Ex parte* Fallon, 5 Term Rep. 283; and Horn *v.* Horn, 7 East, 529; to which might be added, Doe *v.* Philips, 1 Taunt. 356. But the point is not now of much importance. The decisions under the Annuity Act had gone far beyond the letter, and in many cases even beyond the spirit of the law: and perhaps there was not any act in the statute book on which so many cases had been decided within any thing like the same space of time. The expense of the memorial was very considerable, and the effect of the decisions, by increasing the risk of the transaction, drove fair purchasers out of the market, and lowered the price of life annuities: first, because the number of buyers was small; and secondly, because the purchasers required to be paid not only the common rate of annuity interest, but also the value of the risk of the transaction being void under the act. The Annuity Act, after having been thirty-five years in operation, was repealed by the 53 Geo. III. c. 141, except as to annuities granted before the passing of the repealing statute; and other provisions were substituted in lieu thereof.

The first section repeals the old act.

The second section requires that within thirty (in the old act it was *twenty*) days after the execution of every deed, bond,

(t) *Vide supra*, p. 247.

instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing of the act, be granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument or other assurance, of the names of all the parties, and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery, in the form or to the effect following, with such alterations therein as the nature and circumstances of any particular case may reasonably require: otherwise every such deed, bond, instrument or other assurance, shall be null and void, to all intents and purposes.

FORM

FORM OF ENROLMENT.

Date of Instrument.	Nature of Instrument.	Names of Parties.	Names of Witnesses.	Name or Names of Person or Persons by whom Annuity or Rent Charge to be beneficially received.	Person or Persons for whose Life or Lives the Annuity or Rent Charge is granted.	Consideration, and how paid.	Amount of Annuity or Rent Charge.
10 Aug. 1813.	Indentures of Lease and Release.	*A. B.* of one Part. *C. D.* of the other Part.	*E. F.* of - - *G. H.* of - -	*C. D.* - - -	*A. B.* - - -	£. 100. paid in Money. £. 500. paid in Notes of the Governor and Company of the Bank of England, or other Notes or Bills of Exchange, as the case may be.	£. 100. a year.
Same Date.	Bond in Penalty of £. 1,200.	*A. B.* to *C. D.* - -	*E. F.* - - *G. H.* - -	For securing the same Annuity or Rent Charge.			
Same Date.	Warrant of Attorney to confess Judgment on the same Bond.	*A. B.* to *I. K.* and *L. M.* Attornies of Court of King's Bench.	*E. F.* - - *G. H.* - -				

The great object of this provision was to give publicity to the transaction, and at the same time to avoid unnecessary expense to the grantor; and by the simplicity of the memorial to avoid if possible future litigation. As the act passed the House of Commons, the memorial was required to contain only four things, viz. 1. the date of the grant; 2. the name of the grantor; 3. the name of the person by whom the annuity was to be beneficially received; and 4. the amount of the annuity. The statement of the consideration was omitted, lest it should open a door to the mischiefs which the act was intended to guard against. The schedule stands as it was amended in the House of Lords. The nature of the instrument is required to be stated, to which there can be no particular objection, although it is not mentioned in the body of the act. The next amendment substitutes the names of the parties for the name of the grantor. This seems open to objection, for in many cases it may not appear who is the grantor: for example, if Richard is possessed of a lease in trust for Edward, and Edward sells an annuity to Frederick, the deed would, in the ordinary course, be made between Richard of the first part, Edward of the second part, and Frederick of the third part, and thus the memorial would stand; from which it would be inferred that Richard and not Edward was the grantor. The provision in the act, as it passed the House of Commons, was not open to this objection. The third column requires the *names* of the parties simply to be stated, and does not seem to require their additions to be inserted, but in the next column where the *names* of the witnesses are required, a blank is left in the example, manifestly for the addition, "*E. F.* of ." In complying with both these requisitions, the additions of the persons should be inserted, and this is expressly required in the latter instance. This fourth column was an amendment in the Lords. In the late case of Darwin *v.* Lincoln, 5 Barn. and Ald. 444, it was held that a witness described in the memorial as the clerk of the attorney was not well described, because his place of abode was not stated. It is to be regretted that this decision was pronounced. *It will invalidate many annuities*; for it has always been usual in attestations to deeds, to describe clerks of attornies as such, and not to mention their place of residence; and experience has long shown that such a description was best calculated to furnish the parties interested under the deed with the means of tracing the witnesses to it. The act certainly did not intend to alter the practice in this respect; and the words of it would not be

be violated by allowing the former practice still to be followed. It would be prudent to state which of the several executions the witnesses attested. It is sufficient to state, that the annuity was granted for the lives of *A. B.* &c. without stating more than their names, or adding that the annuity was granted for their joint lives, or the life of the survivor, or for a term of years determinable on those lives. Barber *v.* Gamson, 4 Barn. and Ald. 281. Another amendment requires the statement of the consideration *and how paid.* The latter words it was at first thought might be understood, *in what manner,* which would lead to all the inconveniences intended to be remedied, but it now seems agreed, that the words are not open to that construction: the meaning is, that the amount of the consideration shall be stated, and whether paid in money, notes, bills, &c. This is clear from the explanation in the act; it need not therefore be stated by or to whom the money was paid, and there is now no exception to the rule, that a payment by an agent is a payment by the principal. It is observable that the amendment requires the *pecuniary* consideration or considerations to be stated. Perhaps it escaped observation, that the act extends as well to annuities granted for money's worth, as for money, but as the act stands, it is clear that none but money considerations need be stated in the memorial. It has been decided in James *v.* James, 2 Brod. and Bing. 702, that an annuity granted in consideration of a conveyance of a life interest in land does not require enrolment. The Court said, that the words in the tenth section, declaring that the act shall not extend "to any voluntary annuity granted without regard to pecuniary consideration or money's worth," import that money's worth may, in certain cases, be "a pecuniary consideration" within the meaning of the act; as where the grantee pays for the annuity in part, or in whole, by goods or merchandize, with a nominal or perhaps real value imposed upon them, to be converted into money by the grantor, and where the object of the grantor was to raise money, and such appears to be the real nature of the transaction, however it may be disguised. But considering the second and tenth sections together, and the intent of the legislature as it is to be collected therefrom, the Court was of opinion that the act does not extend to cases of fair and *bonâ fide* sale of landed property, whether freehold for life or leasehold for term of years, where the consideration in part or in whole may be an annuity to be paid to the vendor. In such cases, the consideration for granting the annuity, being

an estate in land *bonâ fide* sold and conveyed, did not appear to the Court to be a pecuniary consideration or money's worth within the meaning of the statute.

The form of the memorial is the only part of the act in which any substantial amendment was made in the House of Lords.

It has been decided, that the memorial need not state that the annuity is redeemable. That clause does not come within the schedule, and as Abbott, C. J. remarked, if any thing not specified in the schedule be necessary, the schedule itself would be worse than useless. The name of the party in whose favour a warrant of attorney is given need not be stated in the memorial; Yems *v.* Smith, 3 Barn. and Ald. 206; nor is it necessary to state for what penal sum it authorizes a confession of judgment. Barber *v.* Gamsom. 4 Barn. and Ald. 281.

The third section provides, that if any such annuity shall be granted by, or to or for the benefit of any company exceeding in number ten persons, which company shall be formed for the purpose of granting or purchasing annuities, it shall be sufficient in any such memorial to describe such company by the usual firm or name of trade.

The fourth section enacts, that in every deed, bond, instrument or other assurance, whereby any annuity or rent charge shall, from and after the passing of this act, be granted or attempted to be granted, for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, where the person or persons to whom such annuity shall be granted or secured to be paid, shall not be entitled thereto beneficially, the name or names of the person or persons who is or are intended to take the annuity beneficially, shall be described in such or the like manner as is hereinbefore required in the enrolment; otherwise every such deed, instrument or other assurance, shall be null and void.

The object of this provision was to prevent one person from secretly buying an annuity in the name of another. It was thought right that the grantor should know with whom he was dealing: in all other respects, an annuity deed is now placed on the same footing with other deeds. This is a great point gained. If the consideration is money, it must be correctly stated under the last stamp act; if it is stated as a money consideration, and any part is paid in goods, the annuity, as we shall presently see, may be set aside.

The fifth section enables the grantor to obtain a copy of the deeds by a judge's summons.

The

The sixth section enacts, that if any part of the consideration for the purchase of any such annuity or rent charge, shall be returned to the person advancing the same, or in case such consideration, or any part of it, shall be paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid; *or if such consideration is expressed to be paid in money, but the same or any part of it shall be paid in goods*; or if the consideration or any part of it shall be retained, on pretence of answering the future payments of the annuity or rent charge, or any other pretence; in all and every the aforesaid cases, it shall be lawful for the person by whom the annuity or rent charge is made payable, *or whose property is liable to be charged or affected thereby*, to apply to the Court in which any action shall be brought for payment of the annuity or rent charge, or judgment entered, by motion, to stay proceedings on the action or judgment, and if it shall appear to the Court that such practices as aforesaid, or any of them, have been used, it shall and may be lawful for the Court to order every deed, bond, instrument or other assurance, whereby the annuity or rent charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated. See Barber *v.* Gamson, 4 Barn. and Ald. 281.

This is similar to a provision in the old act, with the addition of the words in italics, and the power is enlarged to cancel *every* security for the annuity.

The seventh section provides, that a book shall be kept for the enrolment of the memorials, 20 *s.* to be paid for the entry of the memorial, 1 *s.* for every certificate of entry and copy, and 1 *s.* for every search.

The eighth section renders void contracts with infants, and the ninth punishes brokers taking beyond 10 *s.* per cent. for brokerage. These provisions are copied from the old act.

The tenth and last section enacts, that the act shall not extend *to Scotland or Ireland*, nor to any annuity or rent charge given by will or by marriage settlement, or for the advancement of a child, nor to any annuity or rent charge secured upon *freehold or copyhold or customary lands, in Great Britain or Ireland, or in any of His Majesty's possessions beyond the seas*, of equal or greater annual value than the said annuity, *over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant*, whereof the grantor is seised in fee simple or fee tail in possession,

possession, *or the fee simple whereof in possession, the grantor is enabled to charge at the time of the grant,* or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity or rent charge, granted without regard to pecuniary consideration *or money's worth*; nor to any annuity or rent charge granted by any body corporate, or under any authority or trust created by act of parliament.

This is copied from the old act, with the additions in italics; the additions require no explanation, and I believe meet all the questions which arose on the provision in the repealed act. The provision in the old act, which excepted out of its provisions, annuities not exceeding 10*l.* was not inserted in the new one. The practice with professed money lenders, was to split the consideration into several parts, and make the man wanting the money grant 10*l.* annuities to different persons, to the amount agreed upon. By this plan they increased the expenses of the grantor to a considerable amount, and at the same time avoided giving publicity to the transaction.

In considering the operation of the new act, it will be necessary for the reader to keep in view the circumstance, that it extends to annuities, although not exceeding 10*l.* and also embraces annuities granted for money's worth. As to the latter, see James *v.* James, before cited.

No. XIII.

Coussmaker v. *Sewell* (*u*), *Ch. 4th May* 1791.

In this cause it was referred to Master Greaves, to see if a good title could be made to the estate in question. An abstract was delivered. It appeared by it, that William Perkins, an ancestor of the vendor, had made a settlement of his estate in the year 1705; but neither the settlement itself, nor any copy or abstract of it, could be produced, and the contents of it were totally unknown. In 1751 a fine was levied by Mr. Perkins and his eldest son; and in 1760 a recovery was suffered, in which Mr. Perkins and his second son (the eldest son being then dead) joined in making a tenant to the *præcipe*, and the second son was vouched. The estate was mortgaged in 1759, and the title was then approved of by Mr. Serjeant Hill; and from the wording of his opinion, it was collected, that the settlement of 1705 was then before him. Supposing the limita-

(*u*) *Vide supra*, p. 313.

tions

tions in the settlement of 1705 to have been to the sons of that marriage successively in tail male, those estates tail, and the remainders expectant upon them (if any) were completely barred by the fine and recovery.

The counsel for the purchaser objected to the title, on the ground that the deed of 1705 was not produced, and that it might contain limitations which were not barred by the fine and recovery; and might have created charges to which the estate still continued subject.

These objections were laid before the Master; and the vendor not acquiescing in them, they were argued before him. The counsel for the purchaser avowed his client to be an unwilling purchaser, and stated his objections with great perspicuity and ability, and required of the Master, that if he did not think the title such as a court of equity was warranted to *force* on an unwilling purchaser, he should not report in favour of it. The original opinion of Mr. Serjeant Hill could not be produced, and the serjeant had not that recollection of what was before him at the time he gave the opinion, as enabled him to say that he had seen the settlement. Much stress was not, therefore, laid upon the opinion. On the 21st February 1791, the Master made his report, in which he stated, that he had seen the opinions given by Mr. Serjeant Hill and by Mr. Shadwell, the purchaser's counsel; and that, considering the circumstances of the case, and the length of the possession since the recovery, he was of opinion a good title might be made. To this report the purchaser excepted, and the exceptions were argued before the Chancellor on the 4th May 1791, by Sir John Scott, with great earnestness; but the Chancellor overruled them, and the report was confirmed.

No. XIV.

Clay v. *Sharpe, Ch. Mich. Term*, 1802 (*x*).

By indenture, bearing date the 28th of November 1798, and made between Thomas Wardell of the first part, George Taylor and Ann his wife of the second part, E. Day of the third part, and William Sharpe of the fourth part, certain leasehold estates were assigned unto the said Edward Day, his executors, administrators and assigns, subject to a proviso or condition for redemption, upon Wardell's transferring into the name of Day, his executors, administrators or assigns, 2,000*l.* 3 per cent. conso-

(*x*) *Vide supra*, p. 315.

lidated

lidated bank annuities. And it was by the indenture agreed, that if default should be made contrary to the proviso or condition of redemption, it should be lawful for the said defendant Edward Day, to sell the said leasehold premises for the best price that could be reasonably gotten for the same; and to reimburse himself the costs, charges and expenses relating to such sale; and afterwards to re-purchase the said 2,000 *l.* 3 per cent. consolidated bank annuities, or such part thereof as should remain due or untransferred; and the overplus of the monies to arise by the said sale, if any, to pay to the said Thomas Wardell, his executors, administrators or assigns. And the said Thomas Wardell did, by the said indenture, covenant, that in case of any sale pursuant to the power aforesaid, he the said Thomas Wardell, his executors or administrators, would join and concur therein, and execute any assignment to the purchaser or purchasers of the said premises, with the usual covenants for the title thereto; or do any reasonable act confirming such sale. But that, nevertheless, it should not be necessary that the joining of the said Thomas Wardell in any such sale or conveyance, should be essential to perfect the title, the same being intended only for satisfaction of such purchaser or purchasers.

Default was made in transferring the stock, and Day, who was a trustee, by Sharpe's directions, put up the premises for sale by public auction, at which sale the plaintiff became the purchaser.

The plaintiff's attorney prepared a draft of the assignment, in which he made Day the mortgagee, Sharpe the *cestui que trust*, and Wardell the mortgagor parties; but Wardell the mortgagor having refused to execute the assignment, the plaintiff filed his bill against Day, Sharpe and Wardell, for a specific performance of the contract for sale.

To this bill the defendants put in their answers, and Wardell stated that he resisted the sale, as having been made without his consent, and at an undervalue; but before any proceedings were had, Wardell became a bankrupt, and in consequence thereof, a supplemental bill was filed against his assignees.

The cause coming on to be heard the 15th of November 1802, the Chancellor decreed that the plaintiff's bills should be dismissed as against the defendants, Thomas Wardell, and his assignees, *with costs*, to be taxed by the Master. And it was also decreed, that the agreement entered into by the plaintiff with the defendants William Sharpe and Edward Day, for the purchase of the premises in question, should be carried into execution.

tion. And that upon the plaintiffs paying unto the said defendants William Sharpe and Edward Day, the residue of the purchase money for the premises, the said defendants should execute an assignment of the lease of the said premises to the plaintiff, or as he should appoint. And that the defendants Sharpe and Day, should pay to the plaintiff his costs of the said suit, so far as the bills were not dismissed, as thereinbefore directed, to be taxed by the Master, in case the parties differed about the same.

No. XV.

Belch v. *Harvey* (*y*), *Ch. Mich.* 9 *Geo. II.*

This cause was very long and intricate; but the chief question was, what length of time would bar an equity of redemption? And as to that point, Talbot, Lord Chancellor, said that courts of equity had of later years generally adhered to the time laid down in the statute of limitations with regard to ejectments, and that it was certainly right to have fixed rules in equity as well as law, that people might know how far their property extended, and where it was bound; and that he did not know any more reasonable rule in general, than what the legislature had prescribed for such possessory actions. The person claiming the equity of redemption offered some proof out of the Ecclesiastical Court, to show she was an infant at the time of her marriage, which was not allowed to be read, and other proof that the marriage continued for many years, both which, taken together, would excuse the non-redemption for a long time; but my Lord Chancellor gave her liberty to file an interrogatory to prove her infancy at the time of her marriage, if she could; and said, he would then consider whether equity had also followed the statute of limitations in allowing only ten years for infants and *femes covert* to commence their suits after the imperfections removed, for he did not remember the Court had pursued that part of the statute; and Mr. Verney, king's counsel, cited the case of *Brewer* and *Bakerstraw*, which he believed to be about five years ago, where the father mortgaged some chambers in Gray's Inn, and died, leaving his son an infant, during which time many years were saved; and yet nineteen years after he was come of age he was permitted to redeem. But to this Mr. Fazakerly answered, there was as much reason for observing it in the one

(*y*) *Vide supra*, p. 338.

case

case as the other; and that, in the present case, thirteen years had passed between the death of the husband and the bill filed for a redemption. This was on a supposition she could prove her infancy at the time of her marriage; for if she was then of full age, my Lord Chancellor said, the time would attach and run out against her, notwithstanding the subsequent marriage, and then she would be put off from all possibility of relief, for there would be near forty years possession against her unaccounted for. By statute 21 Jac. I. c. 16, persons having any right or title of entry must enter within twenty years after titles accrued; but the title of infants, *femes covert*, &c. are saved, so as they commence their suits within ten years after the imperfection removed.

This cause coming on again the same term, was ended by consent of the parties: but Lord Chancellor Talbot spoke, however, in this case to this effect: A peaceable and quiet possession for a long time weighs greatly with me in all cases. The foundation which the Court goes on in cases of the like nature with the present, is not any presumption, that after a long space of time the party has deserted his right; but to quiet and secure men's possessions, which is very reasonable to be done after twenty years time, without some very particular circumstances: and for this cause a court of equity has generally acted in conformity to the statute of limitations. Whether the present plaintiff was an infant at the time of her marriage, is to me very doubtful; but taking it she was then an infant, as the Court has not in general thought proper to exceed twenty years, where there was no disability, in imitation of the first clauses of the statute, so if I had been forced to have made a decree in the present case, I should have been of opinion, that after the disability removed, the time fixed for prosecuting in the proviso, which is ten years, should also have been observed: for the proviso containing an exception of several cases out of the purview of the statute, if the parties at law would avail themselves by the proviso, they must take it under such restrictions as the legislature hath annexed to it, and that is, to sue within ten years after the impediment ceases. Why should not the same rule govern in equity? I think there is great reason that it should. The persons who are the subject of the proviso are not disabled from suing, they are only excused from the necessity of doing it during the continuance of a legal impediment; therefore when that difficulty is removed, and no body can say how long it may last, the time allowed after such impediment

removed

removed for their further proceedings should be shortened. If they would excuse a neglect under the first part of the proviso, should they not do it upon the terms such excuse is given? If I had given my opinion on this case, I should have dismissed the bill.

No. XVI.

The King against John Smith, Esq. (*a*), *Serjeant's Inn Hall, March* 2, 1804.—*The judgment of the Court, as delivered by the Lord Chief Baron.*

This case of the King against Smith has occupied a great deal of the attention of the Court, and that in a great degree owing to the prodigiously extensive consequences that it may have according as it is decided in the one way or the other. We were therefore anxious to search in order to find out what materials existed on the subject. After all the pains we could take, we find them to be but few. We have found no decision or authority similar in its terms to the present case; and the consequence of that is, where we can find principles laid down, we must be governed by them in the absence of every direct precedent on the subject. The magnitude of the question is very considerable, because, on the one hand, from some instances of persons in the service of government, and who have been entrusted with the public money, I have experience enough to say, that the ingenuity exercised by them may be such as not to make it very difficult to avail themselves of their situation, and to render it no easy matter to make them responsible; on the other hand, it puts those who make purchases from persons in such a situation in a very unpleasant and precarious situation, if the lands or goods so purchased may be extended. In this view the question is of very great importance. The stake in the present instance is next to nothing; but the decision will be such as will govern multitudes of cases that exist, and I believe many to exist of the same sort.

This case arises on an extent that was issued against John Montresor, Esq. late engineer in the service of government, in North America, who owed vast sums to government. It was found that a great balance remained in his hands which he had not accounted for. The extent issued to the sheriff of Kent—that you diligently inquire what lands and tenements, and of

(*a*) *Vide supra*, p. 430. 432. 434.

what

what yearly value, the said John Montresor had in your bailiwick on the 28th of September, in the eighteenth year of our reign, when the said John Montresor first became indebted to us in the said money, or at any time after, in the common language.

An inquisition is returned of course, and in the inquisition it is stated that the sheriff seized, &c.

Without going minutely into all the circumstances of this case, I believe I can state from memory, the leading facts upon which the question depends. The property now in question, which consists of a small messuage, and of some closes of land, originally belonged to a Mr. Thompson. He being seised of this property demised it for the full term of five hundred years: the residue of this term was afterwards assigned to Ann Carter; and last of all to John Smith, the present defendant, in trust. And in 1795, Mr. Smith purchased the reversion of General Montresor, he being then seised of this property in his demesne as of fee subject to this term of five hundred years; and at the time of the purchase Mr. Smith had no notice of any debt that had been incurred by John Montresor to the king.

This is the short state of the case, and I believe it is all that is necessary: and the question then is, whether this outstanding term, which is held in trust for Mr. Smith, does or does not protect him against the claim of the crown?

The argument on behalf of Mr. Smith turned almost entirely on the statute of uses in courts of equity, and besides that on the doctrine laid down in Willoughby against Willoughby, which has never been shaken, and which I hope never will. I take that now to be a leading decision, never to be departed from in cases between subject and subject.

In answer to this case, made on the part of the defendant irrefragable as between subject and subject, in answer to this case it was argued, that the case of the crown is essentially different from that of the subject; and as far as we are furnished with light on this subject, it does seem that the case of the crown is essentially different.

In the first place, we find from a variety of authorities, that lands or goods in the hands of debtors or accountants to the crown, or in the hands of those who are debtors to the debtors of the crown, or which are held in trust for them, or to their use, are most clearly the subject of an extent.

Further, we find in Pl. Com. 321, in the great case of the mines in the hands of the crown, there was a great number of the king's

king's debtors brought into the Court of Exchequer, and there the Court held, that lands which had belonged to the king's debtors, which had been their property after they had so become debtors to the crown, were subject to the seizure of the king, into whatever hands they afterwards came, whether by descent, purchase or otherwise. Among other cases there cited, is that of Sir Wm. Seyntloo, who married the widow of Sir Wm. Cavendish, who was treasurer of the household. Sir Wm. Seyntloo and his lady were returned terre-tenants, in right of the wife, of certain land which was Sir Wm. Cavendish's, and were called into the Court of Exchequer, and made accountable for the arrears due to the queen for Sir William's office. See Dyer, 224 and 225. It appears from the case, that after Sir William Cavendish became indebted to the crown, he purchased divers lands, and afterwards aliened them, and took back an estate therein to himself and his wife, and afterwards died without rendering any account, and the terre-tenants (as I have just stated) of the land were charged to answer to Queen Elizabeth for the arrears. These lands might have been seized in the hands of Sir William, and for the same reason they might be seized in the hands of every one who came under him.

In 2 Roll. Ab. 156, the difference is stated between the effect of a sale of land by a debtor to the crown, when that sale took place before he became a debtor, and a sale afterwards. In Dyer 160, there is the case of one Thomas Favell, who was a collector of the fifteenth and tenth. He was indebted to the crown, and being seised of certain lands in fee simple, and having divers goods and chattels, *die intromissionis de collectione et levatione*, of the fifteenth and tenth aforesaid, in extremity of illness aliened his tenements, goods and chattels to divers persons, and died without heir or executor, and process was issued against the terre-tenants, and possessors of the goods and chattels, to account for the collection aforesaid, and to answer and satisfy the king thereof, &c.; and this by the advice of the Chancellor of England, and the Chief Justice of England, and the other judges of either bench. It is therefore clear, beyond all doubt, that the land itself may be extended into whatever hands that land may have been aliened.

The next step which we find in a matter of this kind, is the doctrine which is laid down in Sir Edward Coke's case, and which is mentioned afterwards by Lord Hale in deciding another case, which I shall state by and by. This case of Sir Edward

Coke being of great consequence, the Master of the Court of Wards was assisted by four of the judges in the hearing and debating of it; and after many arguments at the bar, the said four judges argued the same in court, viz. Dodderidge, one of the Justices of the King's Bench; Tanfield, Lord Chief Baron of the Exchequer; Hobart, Lord Chief Justice of the Court of Common Pleas; and Ley, Lord Chief Justice of his Majesty's Court of King's Bench.

First of all I would draw your attention to this point, that this is an infinitely stronger case than any of those I have stated. In general the debtor to the crown was at one time in possession of the land himself; but in this case the king's accountant never had the land in him, the land and debt never centered in the accountant to the crown.

The case in effect was this:—Queen Elizabeth, by her letters patent, did grant to Sir Christopher Hatton the office of remembrancer and collector of the first fruits for his life, *habendum* to him after the death or surrender of one Godfrey, who held the said office, then in possession: Sir Christopher Hatton being thus estated in the said office in reversion, and being seised in fee simple of divers manors, lands and tenements, did covenant to stand seised of his lands, &c. unto the use of himself for life, and afterwards to the use of J. Hatton, his son, in tail, and so to his other sons in tail, with remainder to the right heirs of J. Hatton in fee, with proviso *of revocation*, at his pleasure, during his life. Godfrey, the officer in possession, died, and Sir Christopher Hatton became officer, and was possessed of the office, and afterwards he became indebted to the queen by reason of the said office; and the question in this great cause was, whether the manors and lands which were so conveyed and settled by Sir Christopher Hatton, might be extended for the said debt due to the queen by reason of the proviso and revocation in the said conveyance of assurance of the said manors and lands. The debt due to the queen was assigned over, and the lands were extended, and the extent came to Sir Edward Coke; and the heir of John Hatton sued in the Court of Wards to make void the extent; and it was agreed by the said four justices, and so it was afterwards decreed by Cranfield, Master of the Court of Wards, and the whole Court, that the said manors and lands were liable to the said extent.

The judges on that occasion cite a great number of cases, and some of them go a great deal further than I could have well expected.

expected. I shall just mention two or three of them, and it will be unnecessary to state more. One of the cases there cited is, that of *Walter de Chirton*, customer, who was indebted to the king 18,000*l.* for the customs, and purchased lands with the king's money, and caused the feoffor of the lands to enfeoff certain of his friends, with an intent to defraud and deceive the king; and notwithstanding he himself took the profits of the land to his own use, and those lands upon an inquisition were found, and the value of them, and returned into the Exchequer, and there, by judgment given by the Court, the lands were seised into the king's hands, to remain there till he was satisfied the debt due to him; and yet the estate was never in him; but because he had a power (to wit), by subpœna in chancery, to compel his friends to settle the estate of the lands upon him, therefore they were chargeable to the debt. See Dyer, 160. Walter de Chirton, in that case, never was seised of the said lands; Chirton had no remedy in law to have the lands, but his remedy was only in a court of equity.

Another case is that of Philip Butler, who was sheriff of a county; and being indebted to the king, his feoffees were chargeable to the king's debt by force of the word *habuit*, for *habuit* the lands in his power. In Morgan's case, it was adjudged, that lands purchased in the names of his friends to his use, were extendable for a debt due by him to the king.

There are several other cases cited in Sir Edw. Coke's case, and which are also mentioned by Lord Hale in the case to which I have already alluded. In a great many of these cases, the lands that were seized for the payment of debts due to the crown had been held in trust for the king's debtors; and it was no objection that the legal estate was not in them. The ground of decision there was, that they, by an act of their own, might at any time reduce it into possession; they had it in their power, viz. by a subpœna in chancery, &c. to compel their friends to settle the estate of the lands upon them, and therefore they were made chargeable to the debt.

This being an outstanding term held in trust, it is analogous to all the cases of uses and trusts. It was held there to be no objection, that the legal estate was not in him, because it was in his power, by an act of his own, to reduce it into possession.

But the case that comes nearest to the present is that of the Attorney-general against Sir George Sands.

Upon an information exhibited here, and proceedings upon it,

a case was made and stated, which was to this effect, viz. Sir R. Freeman purchased lands for the term of ninety-nine years, in his own name, and afterwards purchased the inheritance of the same lands in trust, and then by his will disposed of these lands to the sons of Sir George Sands, his grand-children, born, or which should be born in his life-time, and directed conveyances to be made accordingly by his trustees, and died. At that time Sir George Sands had two sons, Freeman and George, and Freeman died; and after the death of Sir Ralph, Sir George had another son, Freeman, who killed his brother George, for which he was attainted and executed, and no conveyances were made by the trustees, pursuant to Sir Ralph Freeman's will; and the questions hereupon were two: 1st, Whether, as this case is, the term for years was forfeited; 2dly, Whether or no the inheritance in trust was forfeited.

The result in this case was, that, inasmuch as there did not appear to be a tenure, there could be no forfeiture for the felony; because to a forfeiture for felony, and to an escheat, a tenure is requisite, and therefore judgment was afterwards given *quod defendens eat inde sine die.*

This case of Sir George Sands is reported in Hardress, 488, and also in Freeman. I mention this case with greater confidence, because, though Lord Mansfield, in the case of Burgess against Wheate, 1 Blackst. Rep. 123, observes, in delivering his judgment, that it was a family business, and that the circumstances of Sir Geo. Sands' case were compassionate; yet I have the authority of Lord Keeper Henley for saying it was decided on great principles of law.—Having this authority with me at this great distance of time, I conceive it gives it the description I have now mentioned.

Hale, Chief Baron, says, there is no question concerning the forfeiture of the fee simple in trust, for that must arise by escheat, and there can be no escheat, but *pro defectu tenentis.* But here is a tenant *in esse.* If the offence committed had been treason, then there might have been a question, whether the inheritance in this case should be forfeited, in respect that the rent and tenure have a continuance. But whether Sir George Sands shall hold the land discharged of the lease, or that the king shall have the term, is the sole doubt. The king does not gain an interest in a trust by forfeiture as he does in debt; for there the interest of the bond passes to the king, and process lies to execute it in the king's own name. And it is questionable,

able, whether the king can have this in point of prerogative, in case of felony; though perhaps more might be said, if the case had been treason. It is the intention of the party that creates and governs uses and trusts; and therefore a lease shall be deemed to attend the inheritance, if it appears the parties intended it should do so, as here it does; and then it is no more than a shadow, an accessary to it, for otherwise it would not be attendant on it. And then it cannot, in this case, go to the felon, but to the administrator of George, the son. And here they are consolidated by the intention of the will, which directs that the trustees shall make conveyances accordingly. Nor is it kept on foot, but only to avoid mesne incumbrances, which might affect the inheritance. And this appears to have been the intention of the parties when the fee was purchased, and therefore the lease ought to go with the fee; and in the cases of leases for years in trust, that have been forfeited, fraud was the ground of it in the cases that have been cited.

Lord Hale says on another occasion, (for this case was twice spoken to by the Court,) I agree, that in the case of the king's debtor, lands in trust for him in fee simple are liable to the king's debt by the common law, *per cursum scaccarii*, which makes the law in such cases; and this appears by precedents *temp.* Hen. VI.; and before 4 Henry VII. a trust or use was liable to a statute; and that is the reason of Chirton's case in 50 Ass. And it was held, in Sir Edward Coke's case in *Curia Wardorum*, that if the king's debtors have a power of revocation, that makes them liable to the king's debt; and that was the reason of Babington's case *in Curia Wardorum*, in 30 Car.; and of Hoad's case *in Pasch.* 4 *Jac.* where lands in trust for a recusant were subjected to the debt of 20*l. per mensem:* so, in 41 Eliz. Babington's case, a trust liable to a debt imprest, because *cestui que trust* has a profit by it, but that is a special case, and grounded on a special course in the Exchequer. He proceeds to state many other cases, which I think it unnecessary to mention.

If you take the converse of this case, I think it will make it still more clear. The reason why the term was not forfeited, was, because the inheritance thereof was not forfeited; but if the inheritance had been forfeited, the term must have been forfeited. In deciding according to the course of the common law, I therefore think it clear that an outstanding term cannot defeat the king's process by extent, In courts of equity it has been

said, that a purchaser without notice is a person favoured by that Court. Perhaps it may be a sufficient answer to say, that in the present instance we are not in a court of equity. The question is, What ought to be our decision according to the common law? This question could not be decided in a court of equity: they could not sue for a decree. When a court of equity is resorted to, and this is the situation of the parties, the Court does nothing but stand neuter between such parties, and leaves them to make the most of it.

Now, therefore, I think, on the whole, in the first *place*, the land is chargeable that has been in the hands of the king's debtors; and from the cases that have been decided it is sufficiently clear, that the term is; it is the whole interest in the land, whether it be divided or not: and so likewise in uses and trusts; and from what is said by Lord Hale, I infer the same doctrine is applicable to the actual case now before us.

It was hinted, that the 33 Hen. VIII. c. 39, sect. 50, 53, and 74, puts the king's debts on the same footing as a *statute staple*; but we find the same difficulty again recurs, for the 33 of Hen. VIII. does not alter the subject out of which the thing is to be paid. If I suppose, in the present instance, they are put on the same footing with statutes staple, the question would return; supposing the king has a debt upon bond, which is to be treated as a statute staple, I do not find the act meddles with the subject out of which he is to compel the payment of his debt, but the act relates singly to the mode by which he is to do it; and if the king were to put it on the footing of a statute staple, it would deprive him of no remedy which the common law gave him. The subject is not at all touched by the statute, but merely the manner in which he is to proceed, which perhaps gives the subject rather more advantages than he had before, though I do not see very clearly in what respect the situation of the king's accountant is altered.

Now that being so, it should seem to be the result of what one finds in the books, that of the king's common law remedy it is impossible to doubt; and that remedy is given in every case where the party who is indebted to the crown has a present beneficial interest, as well as a reversion: both of these are considered as chargeable for the debt of the crown; the lands of the king's debtor may be extended by the crown, in whatever hands they may be found, and therefore, upon the whole, the judgment of the court in this case must be for the crown.

Judgment for the King.

No. XVII.

The Attorney-General v. *Lockley and others* (*b*).
Chan. Mich. 9 *Geo. II.*

This was an information brought to secure a charity, and the case was thus: John Radford, and Anne his wife, were seised in fee, and conveyed the premises by fine and deeds, declaring the uses thereof, to their trustees and their heirs, to the use of them and their heirs, in trust for John Radford and his wife, and the survivor of them, and the heirs of the survivor, with power for the wife, in case the husband survived her, to charge the estate with 400*l.* The wife died first and executed her power for charitable uses; John enjoyed the estate during his life; and by will, dated 25th Jan. 1723, he devised the premises in fee to Tuder Lockley. Now this estate was to be sold for discharging the charity and payment of mortgages made by Tuder Lockley: and the question was, whether the sale should be subject to the dower of Tuder Lockley's wife, in case she survived her husband. It was argued by *Noel* in favour of dower, and by *Verney* against it; and the following cases were cited: Preced. Canc. 241, 250; *Banks and Sutton at the Rolls*, March 1733; Preced. Canc. 336; Chan. Rep. 369; Show. 111; Preced. Canc. 65; Cro. Car. 901; *Ambrose and Ambrose*, determined in the year 1717, in the House of Lords (I).

Talbot, Lord Chancellor. This is a considerable point, and should be settled some way or other; in the first place, with regard to the wife, her demand is properly a legal one, and it has been hinted at, as if the legal estate was executed in Mr. Tuder Lockley; but there is no foundation for that, as the estate is limited to trustees and their heirs; therefore it is a legal estate absolutely executed in the trustees, for there cannot be a use limited on a use. Then the question will be, whether Tuder Lockley's

(*b*) *Vide supra*, p. 436, *n.*

(I) This is the case in 1 P. Wms. 321. The case was, that the deceased husband bought an estate in the name of a third person. The Court considered it clear that the wife was not dowable of the trust estate. It appears by the report, that the decree was affirmed in the House of Lords. I find by the Journals of the House of Lords, that the wife prayed that the estate might be deemed part of the personal estate of her husband, or at least that she might be entitled to her dower out of it. See Journ. Dom. Proc. vol. 20, p. 456.

wife is entitled to dower of an equitable estate of inheritance vested in her husband; for at present the husband is living, and if the wife died before him, then this question never can arise. As dower is a legal demand, so clearly with regard to a use, a wife was not dowable of it before the stat. Hen. VIII. Vernon's case, 4 Co. 1. Then how can she be dowable of a trust after that statute? For is there any solid distinction between a use before a statute and a trust after it? What was a use but a right to receive the rents and profits of lands of which the legal estate was in another? And a trust is the very same now: and if before the statute the right of the wife was considered strictly as a legal right, so that the equitable interest was not affected by it, the reason holds equally strong since the statute, that courts of equity should follow what was the rule before the statute with regard to those estates. How there came to be a difference as to estates by curtesy, I cannot tell; nor how it came to be extended to estates by curtesy, and yet not to dower, I cannot tell. I do not see, on this general question, whether a wife shall be endowed of a trust estate of inheritance, that there is one case, from the time of the stat. H. VIII. to this time, that is directly in point, except the case of Fletcher and Robinson, Preced. in Canc. 250. That case is extremely short; and the reason given for it is, whether it be a good one or no I shall not say, that the conveyance was considered as fraudulent, being done with an intent to prevent a forfeiture; and therefore, in that case, the Court seems to have disregarded it, which shows it was not determined simply on this point, but on other matters, which do not fall in with this case. The case of Banks and Sutton seems to have been determined on this, that the time of the conveyance was come, and the husband had a right to call for it; and then the Court, upon considering that as done which ought to have been done, might properly assist the wife in that case. The case of Bottomley *v.* Fairfax, Preced. in Canc. 336, before my Lord Harcourt, is an express authority that a wife is not dowable of a trust estate of inheritance; and to this it may also be added, that it is the general received opinion of every one who has attended this bar constantly, that they are not; and it is the practice to make purchases in the name of the purchaser and trustee—but to what intent or purpose? Only to prevent dower, that by there being a survivor to the purchaser, his wife might not be entitled to it. But if it should be ruled, that a wife is entitled to a dower of a trust estate of inheritance, pro-

visions

visions of this kind would be overthrown. I mention this, because it is hinted at, as if the practice of conveyancers was not of great weight; and truly it is not in their power to alter the law: but when there is a received opinion, and conformity of contracts, and settlements thereon, it is extremely dangerous to shake it, which would disturb the possession of many who are very quiet, and think themselves very secure; therefore it ought to be done only on the clearest and plainest ground. In the present case I cannot say they are mistaken, because they have gone on this ground, that trusts are now what uses were at the common law, where a wife was not dowable of a use. There are other cases where terms for years have been carved out, and the inheritance remains in the husband: and as to those there is no difficulty. Where the term is created for particular purposes, and the inheritance remains in the husband, and descends to his heir, which term is not a bar at law of dower, but only prevents the execution of it till the term is expired, there the term may be redeemed; and that was the case of my Lady Dudley, Preced. in Canc. 241. There the express limitation of the term was to the owner of the freehold after the trust expired. As to those cases where the inheritance is sold for a valuable consideration, (Preced. in Canc. 65,) which was the case of Lady Radnor, and the purchaser took an assignment of the term, if it was without notice, there could be no difficulty; but whether that case was so or not, I do not remember. But the present case is not that of a wife entitled to dower with a *cessat executio*; for the question here is, whether the wife is dowable of an equitable estate of inheritance in fee simple. As to what is said, that this is to be considered as a contract on the part of the wife, therefore equity should supply it: the answer is, equity, where there is a valuable consideration, will supply form. But hath she contracted for this particular estate? No, for nothing but what the marriage implies, which is, that she shall have dower of what she is dowable by law: and then the question comes to this, whether she is dowable by law of a trust? Here she could have nothing of this in contemplation at the time of her marriage: for the equitable interest was left to her husband, long after the time of her marriage, which was in 1713; and the equitable estate was not given him till 1723. Therefore the decree must be, that the land shall be sold and enjoyed, discharged of any claim of dower.

In another manuscript note of this case, Lord Talbot is reported to

to have said that trust estates, since the statute of uses, ought to be considered as uses, before the statute, of which estate a woman could not be endowed; that the case of Bottomley and Lord Fairfax was express in point: that, as this method of conveying on purpose to prevent dower, had been used for so many years, a court of equity ought not to make a decree which would overturn such a number of settlements. And the reason of the decree in the case of Banks and Sutton (which he stated) was different: for there the direction of the will was, that the legal estate should be conveyed to Sutton: and the wife married him on the expectation of that estate, and it was a fraud in the husband not to call for the settlement. The other cases of dower of trust estates are, where terms are created for particular purposes, and the inheritance remains in the husband: in these cases she has a title of dower, and so she may come into this Court and redeem the term, which is the case of Lady Dudley.

No. XVIII.

Bret v. *Sawbridge and others* (*c*). *Before the Master of the Rolls.*

Sir John Wroth was seised in fee of the lands in dispute, and mortgaged the same for one thousand years to Francis Hill, as a security for 1,100 *l.* which, by several mesne assignments and further charges, to the amount of 2,400 *l.* in the whole, came to Richard Watson, in trust for Sir Edward Bret; and Brewster (who assigned the same to Watson), covenanted that Sir John Wroth, or his heirs, should convey the inheritance to Sir Edward Bret: and Sir Edward Bret reciting by his will, that he had purchased of Brewster the residue of the said term of one thousand years, and that there was a covenant in the purchase deed from Brewster as aforesaid, but that Sir John Wroth dying before the conveyances were executed, and leaving an infant of eight years old his heir at law, it was then impossible to have the fee conveyed: therefore Sir Edward Bret declared it to be his will, that when the heirs of Sir John Wroth should attain the age of twenty-one, a conveyance should be executed according to the settlement in tail after mentioned; and he devised the same to John Bret Fisher for life, remainder

(*c*) *Vide supra*, p. 445.

to

to trustees, to preserve contingent remainders; remainder to his first and every other son in tail male successively; remainder to Nathaniel Fisher for life, and in the very same manner; and so to Edward Fisher; remainder to the right heirs of Stephen Beckingham and Richard Watson (the trustees of the term), whom he made his executors; *and then he directed the remainder of the term should remain, and be attendant on the inheritance*, according to the limitations above-mentioned: and all other his real and personal estate he devised to John Bret Fisher, Nathaniel and Edward Fisher. Upon the death of Sir Edward Bret, the executors proved the will; and afterwards Nathaniel and Edward Fisher died intestate, without ever having any issue; and John their brother took out administration to them. John Bret Fisher, thinking the limitations over to the right heirs of Beckingham and Watson void, took himself to be absolute owner of the term, as co-residuary legatee, and representative of the other two his brothers, in case he should ever die without having issue, and mortgaged the residue of the term for one thousand years to the defendant Sawbridge, as a security for 350 *l.* One Newland purchased the reversion, and the equity of redemption, from the right heirs of Sir John Wroth, for one hundred broad pieces; but before the purchase, he promised John Bret Fisher should have the benefit of it, if he would pay him the purchase money, his expenses, and a small gratuity: however John Bret Fisher, a long time after the purchase was completed, neglected to comply with the terms, and so it was sold to the defendant Sawbridge. John Bret Fisher, by his will, devised all his real and personal estate to the defendant Sawbridge, and made him his executor, and afterwards died without ever having issue.

The plaintiff filed his bill, to have the estate conveyed to him according to the will of Sir Edward Bret, all the precedent limitations being spent, and to have an account of the rents and profits, he being heir at law, and also representative of the personal estate of Richard Watson, who died in the life-time of John Bret Fisher: but Stephen Beckingham is still alive, and made a defendant in this cause.

Sir Joseph Jekyll, Master of the Rolls, after argument on both sides, and time taken to consider of it, delivered his opinion to the effect following: The plaintiff in this case does not want to have the term assigned to him, because he has the legal interest of it in him, as representative of Richard Watson, who was a trustee

trustee of the same for Sir Edward Bret. Then the point to be determined is with regard to the account of the rents and profits. Though Brewster covenanted that Sir John Wroth, or his heirs, should convey the inheritance to Sir Edward Bret and his heirs, yet it does not appear that Sir John Wroth was under any obligation to convey the same; for he was no party to the conveyance to Sir Edward Bret, nor did any thing to show his agreement thereto: but the covenant of Brewster to Sir Edward Bret, being before the statute of frauds, there might be a parol agreement by Sir John Wroth that he would convey, and it would be good; otherwise it would be difficult to account why Brewster should enter into such a covenant. However, Sir Edward Bret, by his will, desiring the heirs of Sir John Wroth to convey the inheritance, and directing the limitations of the same, and that the term should be attendant on it, did intend to devise the inheritance, and not the term in gross. But it is said, though the inheritance cannot pass, the term may, according to the limitations in the will of Sir Edward Bret. It is not necessary now to enter into the question how far limitations of terms are good, or whether, by such limitations as those in the present case, all the prior devisees dying without having had issue, the remainder of this term could vest in the plaintiff as to one moiety. But if I was to deliver my opinion about it, I should be under great difficulty: for on this point there is the opinion of one Lord Chancellor against another; my Lord Cowper, in the case of Higgins and Dowler, 2 Vern. 600, and Salk. 156, held such remainder of a term to be good, all the parties dying without ever having any issue: and by the present Lord Chancellor, there have been two cases determined, Clare and Clare, P. 7 G. II. Saberton and Saberton, 8 G. II. In one of them it may be taken, there was an estate tail in the first taker; but in the other it seems not to be so; but in both of them my Lord Chancellor held such limitations of estates tail, though to persons not in being, and never vesting, to be too remote, and so delivered his opinion. Higgins and Dowler, as it appears to me, was not clearly stated and urged, but was taken as it is reported in Salk. and Vern. which my Lord Chancellor said was incorrectly done in both of them: but I have a complete report of it by two gentlemen; and in the case of Stanley and Lee, M. 8 G. II. I looked into the pleadings and the Register's book; and on the whole matter I find the judgment of my Lord Cowper was, that such limitations never having been in

esse, and so not vesting, the limitation over might be good. There is one case I did not mention, when I gave my opinion in Stanley and Lee, and that is Massenburgh and Ashe, Chan. Rep. 275, in which the Judges were of opinion, that the limitation of a trust of term must be considered as limitations of a term at law; and that case is stronger for allowing limitations over than this, though that was on a deed, and this is on a will, which has a more favourable construction. But I must leave this point of the limitations of a term for future consideration, if ever it comes before the Court, for this case will turn on a different point (I). Here Sir Edward Bret thought he was entitled

(I) It is very satisfactory to find that Sir Joseph Jekyll did not give up his opinion in Stanley *v.* Lee. The doctrine in the case of Stanley *v.* Lee (2 P. Wms. S. C. MS.) is now well established, and the case of Clare *v.* Clare (For. 21, S. C. MS.) is overruled by a series of authorities. See Saburton *v.* Saburton, For. 55. 245. S. C. MS.; Knight *v.* Ellis, 2 Bro. C. C. 570; Phipps *v.* Lord Mulgrave, 3 Ves. jun. 516. The rule, as now settled, is accurately stated by Mr. Fearne—Whatever number of limitations there may be after the first executory devise of the whole interest, any one of them, which is so limited that it must take effect (if at all) within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which could carry the whole interest, happens to vest; but when once any preceding executory limitation, which carries the whole interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested. Exec. Dev. 4th edit. 415.

In a former edition of this work a discussion was introduced, in this place, on the question, whether the term of twenty-one years, after a life in being, could be taken as a term in gross in the case of an executory devise. This will now be found in n. (2) to the last edition of Gilbert on Uses, p. 260. The case of Beard and Westcott, there mentioned, was fully argued before the Master of the Rolls, upon the certificate being returned; and on the 17th Dec. 1811, the Master of the Rolls gave the following judgment:—"This case stood over in consequence of a suggestion, that the certificate of the Court of Common Pleas involved in it the decision of a new question, which had not undergone any particular discussion, or received any particular consideration in that Court: namely, how far the validity of a limitation over, by way of executory devise, is affected by the circumstance, that the period of twenty-one years, after the duration of an estate for life, has not any connection whatever with the minority of any person taking an interest under the preceding limitations. Now I do understand, that the question certainly did not receive any particular consideration in the Court of Common Pleas, it being taken for granted, that the rule upon this subject stood as it is commonly laid down in the books: namely, that the executory devise falls within the allowed limits, if the event upon which it is to take place must happen within a period of twenty-one years after the life or lives in being. I am not aware, however, that the point has been directly decided; and Lord Alvanley's doctrine, in the case of Thellusson and Woodford, is against the addition of twenty-one years,

entitled to the trust of the inheritance, and did not intend to devise the term in gross, but intended to devise the inheritance, and

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years, except by way of provision for the circumstance of the devisee being under age, or in *ventre sa mere* at the expiration of the life or lives in being.—And as the question has now been raised, and as there is that degree of sanction to the doubt, it does seem to me desirable, that it should be set at rest by the decision of a court of law; so, therefore, I propose to send the case back again to the Court of Common Pleas, to call their attention to the point, that they may have an opportunity of pronouncing an explicit opinion upon it. I have received this information from some of the judges.—The case was accordingly sent back to the Court of Common Pleas, who refused to hear it argued, until the point upon which their opinion was required was stated. Thereupon, the following question, with the approbation of the Master of the Rolls, was stated to be the question for the opinion of the Court: "How far the limitations over, in the event of there being no son or sons of John James Beard, nor issue male of such son or sons living at the death of the said John James Beard, or there being such issue male at that time, they shall all die before they attain their respective ages of twenty-one years, without lawful issue male, are affected by the circumstance, that they are to take effect at the end of an absolute term of twenty-one years, after a life in being at the death of the testator, without reference to the infancy of the person intended to take, or by the circumstance, that there may be issue of John James living at his death, to whom the estate is given by the will (but who would be incapable of taking according to the above certificate) for whose death, under twenty-one, the limitation over, in the event before-mentioned, must await.—The case has since been argued before the Judges of the Court of Common Pleas, and they certified, that the limitations over, in the event of there being no son or sons of John James Beard, nor issue male of such son or sons living at the death of John James Beard, or there being such issue male at that time, they shall all die before they attain their respective ages of twenty-one years without lawful issue male, are not affected by the circumstance; that they are to take effect at the end of an absolute term of twenty-one years, after a life in being at the death of the testator, without reference to the infancy of the person intended to take, nor by the circumstance that there may be issue of John James Beard living at his death, to whom the estate is given by the will, but who would be incapable of taking according to the former certificate from the Judges of this Court, for whose death, under twenty-one, the limitation over, in the event before mentioned, must await. The case is now reported in 5 Taunt. p. 393. It has been argued before the Lord Chancellor, who sent the case to the Court of King's Bench. It was argued in that Court, and the Judges certified, that John James Beard, the grandson and heir at law of James Beard the testator, took, under the said testator's will, an estate for ninety-nine years, determinable with his life, in the freehold estates devised to him in the first instance, and also in the leasehold estates if they should so long continue; and that upon his death, leaving one or more sons, his first son will take an estate for ninety-nine years, determinable with his life, in the freehold estates, and what shall then remain of the terms for which the leasehold estates are held. And that all the limitations, subsequent and expectant upon the limitation to the first son of John James Beard, are void.

that

that it should attract the term; Whitechurch *v.* Idem, 10th Feb. G. I. A man being seised of a reversion in fee, and having the trust for a term for years to attend it, made a will of his own hand-writing, and thereby carved out several limitations of the land and premises, not unlike those now in question; but did not publish it in the presence of witnesses; and the doubt was about the limitations of the term; for the will could not pass the inheritance, being not executed according to the statute of frauds. But it was insisted, it might carry the term as the personal estate, upon which the opinion of the Court was taken. But it was determined, it should not pass because the devisor intended to pass an inheritance, and the writing under the testator's own hand was looked on as an inchoate act to pass the inheritance, and therefore could not operate on the term. Besides, the testator in that case having prepared a writing which was intended to be executed according to the statute, there was no notice taken of any term that should be attendant on the inheritance, as there is in the present case, which makes it stronger against the plaintiff than it was in that case. That case looks like an authority that must govern the present case; for though Sir Edward Bret was not entitled to the trust of the inheritance, yet he thought Sir John Wroth was bound to convey, and on that assurance and persuasion made his will and intended to pass it as an inheritance. There are several cases, where a man intended to pass something, and yet the law will not allow it; as in case of a devise, where there is an uncertainty either of the person or the thing, *à fortiori* here it should be void, *because* the testator intended to pass what he had not, for he intended to pass the inheritance when he had it not; and there is a great difference between real and personal estates, as to being assets or not, and also as to the course of succession to whom the same shall go after the death of the owner; and there is likewise a difference where a will is made as to the limitations of the one and of the other; therefore when the testator intended to pass an inheritance and had it not, there is no reason to suppose he designed to pass a term in gross; for he says the term shall be attendant on the inheritance according to the limitations mentioned in the will; and so, as to passing the term, the testator had not *animum testandi*: therefore I conceive the bill must be dismissed.

No. XIX.

Forshall v. *Cole and Short* (*d*), *Ch. 27th Nov.* 1733.
The Master of the Rolls sitting for the Chancellor.

Bill was brought to have a bond delivered up, and proceedings at law upon it to be stayed; the bond was entered into on this occasion: one Durant, in 1728, made a mortgage to plaintiff, but, before this, had given a bond to Cole for 200 *l.* Cole, in 1725, obtained judgment upon his bond, and afterwards, since the date of the mortgage, took out an *elegit*, and extended the mortgaged premises towards satisfaction of his judgment: upon this, plaintiff, to save expense and discharge the lands, gave Cole a bond for the 200 *l.* and interest; but it was agreed between them, that the bond should be deposited in Short's hands, and only to be made use of if Cole's judgment was entered so as to affect the lands precedent to plaintiff's mortgage. The judgment was signed in 1725, but not docketed, *secundum* stat. 4 and 5 W. and M. c. 20, till 28th January 1730.

Upon reading the statute the *Master of the Rolls* was of opinion, that judgments cannot be docketed after the time mentioned in the act, viz. the last day of the subsequent term in which they are entered, and that the practice of the clerk's docketing them after that time, is only an abuse for the sake of their fees, and ineffectual to the party; and he said he would speak to the judges about it.

Solicitor-General.—It is proved in the cause, that the mortgagee had notice of the judgment at the time of the mortgage.

Master of the Rolls.—Notice is not material, the statute not making a difference between a mortgagee with notice or without; and besides, the notice which the act requires is the docketing, which by the act is become a constructive notice; and therefore he decreed the bond to be delivered up and cancelled, and that the plaintiff should have his costs both at law and in this Court, and that the 10 *l.* which plaintiff had paid upon the bond, should be returned, which he said the attorney concerned in entering the judgment ought to pay out of his own pocket; and that he believed an action on the case would lie against him, for he believed it was owing to his negligence that the judgment was not rightly entered: and the defendant Short having delivered up the bond to Cole, and permitted him to proceed at law upon it, contrary to his trust, he decreed costs as against him likewise.

(*d*) *Vide supra*, p. 468, 652, 653, 654, 667.

No. XX.

Burton and others v. *Todd.*
Todd v. *Gee and others* (*e*).

31*st March* 1818. *Judgment by Sir Thomas Plumer, Master of the Rolls.*

These two causes are now to be disposed of. The first cause was instituted in May 1804, by Messrs. Gee and Osborne, and Mrs. Burton, the trustees under the will of Mr. Burton, against Mr. Todd, for a specific performance of an agreement to purchase an estate; which agreement was entered into in August 1802.

In June 1806, the common order for a reference to the Master, whether a good title could be made to the estate, was obtained by the plaintiffs in this suit.

In Dec. 1807, the Master made his report that a good title could not be made. To this report the plaintiffs took an exception, which was overruled in May 1809; no further proceedings have been taken in this suit.

In October 1808, Mr. Todd instituted a suit against Messrs. Gee and Osborne, the trustees, and against the persons interested in taking the accounts under the will of Mr. Burton, to have the necessary accounts taken, and for a specific performance of the agreement, and for a compensation as to the two hundred and twenty-seven acres in the agreement mentioned to be tithe free, or subject to a very trifling modus.

In December 1813, a decree was made in this cause, whereby it was referred to Mr. Steele to take the necessary accounts and inquiries, in order to ascertain whether a good title could be made to the estate in question; and to state whether a good title could be made thereto.

In December 1816, the Master made his report; stating, that a good title could be made to the estate in question, except as to the two hundred and twenty-seven acres in the agreement mentioned to be tithe free, or subject only to a very trifling modus, and which the Master reported not tithe free, or subject to a very trifling modus.

The decree, therefore, in the second suit, is nearly of course. The plaintiff, Mr. Todd, is entitled to a specific performance,

(*e*) *Vide supra*, p. 486.

and to a compensation for the tithes of the two hundred and twenty-seven acres. The only questions are, 1st. As to the principle on which the accounts must be taken: and 2dly, As to the costs.

By the agreement in August 1802, it was stipulated that the purchase money should be paid by instalments; one-third on the 10th of October 1802; one-third on the 5th January 1803; and the remaining one-third on the 5th April 1803, on a good title to the estate being then made.

The purchaser paid the first instalment, amounting to 5,333 *l.* 6 *s.* 8 *d.* on the 10th October 1802, and the vendors have ever since had the same in their possession, and have also received all the rents and profits of the premises; the plaintiff, Mr. Todd, never having been let into possession of any part of the premises. An abstract was delivered in April 1803, and was returned by Mr. Todd, with the objections of counsel, before May 1803; and the principal objection taken to the title was, that the title could not be approved, unless the necessary accounts were taken in a court of equity. The vendors insisted that the purchaser was not entitled to have the accounts taken; and instituted their suit in May 1804, to compel the purchaser to take the estate without having the accounts taken; they failed in that attempt, and Mr. Todd having subsequently instituted the second suit for the purpose of having the accounts taken, was resisted by the vendors, but succeeded.

The vendors then having been uniformly wrong, and the purchaser uniformly right, and the vendors having been in possession of one-third of the purchase money, and in the receipt of all the rents and profits of the estate for upwards of fifteen years; the question is, upon what principle are the accounts to be taken? The usual rule is, that the purchaser is to have the rents, and to pay 4 *l. per cent.* for his purchase money. This rule is rather hard where the delay is not caused by the purchaser. The rents seldom yield 4 *l. per cent.*; and the purchaser having been kept out of the enjoyment of the estate, receives it at last in a worse condition. In the present case, fifteen and a half years delay has been caused by the resistance of the vendors; during that time they have had the enjoyment of nearly 6,000*l.* of the purchase money (which in that period would be doubled); and have also received all the rents: to decree the usual accounts, would be to give the party who is wrong, all the advantage of the delay occasioned by himself; it would be to

reward

reward the party who has done wrong, and to give him a double benefit, and to work injustice to the party who has been uniformly correct. The cause is novel, there is no precedent. It may be said, that Mr. Todd might have applied to have the 5,333*l.* 6*s.* 8*d.* or the rents and profits, brought into Court and laid out, but he has not done so, and the vendors have reaped the benefit of his not doing so.—Under these circumstances, the vendors must account, not only for the rents and profits of the estate from October 1802, but also for interest, after the rate of 4*l. per cent.* upon one-third of the rents and profits.

As to the costs. The original bill must be dismissed with costs; because the vendors, apprized of the objection, instituted an improper suit. As to the second suit. The vendors took no steps to amend the original bill, and to frame it properly to obviate the objection to the title. Mr. Todd had therefore no means of obtaining a specific performance of the agreement, but by the institution of the second suit; the vendors resisted and failed; Mr. Todd succeeded, and a specific performance was decreed. There was no inconsistency on the part of Mr. Todd. The will of Mr. Barton rendered it necessary that the accounts should be taken. All the parties to the second suit were interested in the accounts. The vendors must be at the expense of clearing the title, by taking the accounts; and, therefore, Mr. Todd is entitled also to the costs of the second suit.

No. XXI.

Rea v. *Williams, Exch.* (*f*).

The plaintiff Rea and one Pritchard purchased jointly a lease made by the Duke of Beaufort for the life of another person, and they jointly took the profits of it for some time; but afterwards they conveyed the estate to the defendant Williams, in consideration of 300*l.* as was expressed in the conveyance, though no part of the money was ever paid, and Williams acknowledged by his answer, that he was a mere trustee for the parties; but no declaration of trust was ever executed, nor did it any way appear with what view the estate was vested in the

(*f*) *Vide supra*, p. 588, 589.

 defendant,

defendant, any further than it was believed it was done to screen it from execution, they being both of them much indebted. Afterwards Pritchard died intestate, and the defendant Williams took out administration to him, but there was not assets enough to pay all his debts. This cause came on to a hearing on the bill and answer, and the question was, whether the trusts of the estate belonged to Rea the survivor, as the whole estate indisputably would, if the legal estate had continued in the two purchasers? To prove the trust would survive, were cited 1 Vern. 217; Eq. Cas. Abr. 291; 2 Vern. 556, 683.

Mr. *Wilbraham*, to show this trust did not survive, took a distinction between 2 Vern. 556, and the present case; for there, he said, was an express limitation of the trust to the two daughters, so they might take jointly; but this is a resulting trust only, and no express limitation; and equity, which discourages joint tenantcies, may construe that to be a tenantcy in common; Salk. 158. If a joint tenant for years mortgages his part of the term, this is a severance of the joint tenantcy, 2 Vern. 683.

Reynolds, Chief Baron.—I think the joint tenantcy of the trust in this case was not severed: every one who has an estate has two rights in him, a legal estate and an equitable interest; nothing passed by the conveyance to the defendant but the legal estate, and the equitable interest resided in the two purchasers, and remained as it originally was, the consequence of which is, that it must go to the plaintiff by survivorship. Carter, Thompson and Fortescue were of the same opinion; and Fortescue said, he saw no difference between an express and an implied trust.

No. XXII.

Lechmere v. *Lechmere* (g), *Ch. E. T.* 8 *Geo. II.*

This case was elaborately argued upon the appeal. The argument lasted four days. Upon the first question Lord Talbot delivered his opinion at considerable length. Upon the second question he pronounced the following judgment:

The second question is as to the satisfaction, whether what descended to the heir at law is to be considered as a satisfaction of what he is entitled to under this covenant. As to ques-

(g) *Vide supra*, p. 612, 613, 614.

tions

tions of satisfactions where they are properly so, they have always been between debtor and creditor or their representatives. As to Mr. Lechmere *I do not consider him as a creditor, but as standing in the place of his ancestor,* and thereby entitled to what would have vested in his ancestor. A constructive satisfaction depends on the intention of the party, to be collected from circumstances. But then the thing given must be of the same kind, and of the same or a greater value. The reason is plain, for a man may be bountiful as well as just; and if the sum given be less than the debt, it cannot be intended as a satisfaction, but may be considered as a bounty; and if the thing given is of a different nature, then, also, as the intention of the party is not plain, it must be considered as a bounty. But I do not think the question of satisfaction properly falls within this case, for here it turns on what was the intention of my Lord Lechmere in the purchases made after the articles, for as to all the estates purchased precedent to the articles, there is no colour to say, they can be intended in performance of the articles; and as to the leasehold for life, and the reversion in fee expectant on the estates for life, it cannot be taken they were purchased in pursuance of the articles, because they could not answer the end of them. But as to the other purchases (in fee simple, in possession, &c.) though considered as a satisfaction to a creditor, yet they do not answer, because they are not of equal or greater value. Yet why may they not be intended as bought by him with a view to make good the articles? The Lord Lechmere was bound to lay out the money with the liking of the trustees, but there was no obligation to lay it out all at once, nor was it hardly possible to meet with such a purchase as would exactly tally with it. Part of the lands purchased are in fee simple, in possession, in the south part of Great Britain, and near to the family estate. But it is said they are not bought with the liking of the trustees. The intention of naming trustees was to prevent unreasonable purchases, and the want of this circumstance, if the purchases are agreeable in other respects, is no reason to hinder why they should not be bought in performance of the articles. It is objected, that the articles say the land shall be conveyed immediately. It is not necessary that every parcel should be conveyed so soon as bought, but after the whole was purchased, for it never could be intended that there should be several settlements under the same articles. Whoever is entitled to a performance of the

covenant, the personal estate must be first applied so far as it will go, and if the covenant is performed in part, it must make good the deficiency. But where a man is under an obligation to lay out 30,000 *l.* in lands, and he lays out part as he can find purchases which are attended with all material circumstances, it is more natural to suppose these purchases made with regard to the covenant than without it. When a man lies under an obligation to do a thing, it is more natural to ascribe it to the obligation he lies under, than to a voluntary act, independent of the obligation. Then, as to all the cases of satisfaction, though these purchases are not strictly a satisfaction, yet they may be taken as a step towards performance, and that seems to me rather his intention than to enlarge his real estate. The case of Wilcox and Idem, 2 Vern. 558, though there are some circumstances that are not here, yet it has a good deal of weight with me. There the covenant was not performed, for the estate was to be settled, but the land was left to descend, and a bill was brought to have the articles made good out of the personal estate; to which it was answered, that the 200 *l. per annum* was bought, which descended to you. It is true a settlement hath not been made, but they were bought with an intention to make a settlement, and you can make one. The same will hold as strong in the present case, that these lands were bought to answer the purposes of the articles, and fall within that compass, and it is not an objection, to say they are of unequal value, for a covenant *may be executed in part, though it is not so in satisfaction*; *and in this particular I differ from the Master of the Rolls.* There must be an account of what lands in fee simple in possession were purchased after the articles entered into, and so much as the purchase money of such lands amount to must be looked on in part of satisfaction of the 30,000 *l.* to be laid out in land under the articles, and the residue of the 30,000 *l.* must be made good out of the personal estate.

No. XXIII.

Abstract of the Special Verdict, in Fairfield v. *Birch* (*h*.)

Edmond Kelly, being seised in fee in 1747, made a settlement before his intended marriage, in consideration of the wife's portion, as to part to trustees in fee, in trust to sell and pay off incum-

(*h*) *Vide supra*, p. 626.

brances,

brances, which amounted to 4,000 *l.* As to the residue, to himself for life, remainder to trustees in the usual way, to preserve remainders; remainder to the use, that the wife might receive a jointure rent-charge, in bar of dower; subject thereto, to the first and other sons of the marriage successively in tail male; remainder to the first and other sons of Edmond Kelly by any other wife successively, in tail male; remainder to two brothers of the settlor and their issue male, in strict settlement; remainder to Ignatius Kelly the uncle of the settlor for life; remainder (after a limitation to trustees to preserve) to his first and other sons successively, in tail male, with the reversion to the settlor's right heirs. Power to the settlor if he survived his wife, having issue by her a son, to jointure any after-taken wife, to the extent of 50 *l.* a year; and if no issue male, of 100 *l.* a year; and if no issue, 150 *l.* a year, and 2,000 *l.* for younger children's portions. Covenants for title and further assurance. Power to the settlor to charge 500 *l.* but not to affect the jointure. Proviso, that if the settlor and his brother should die without issue, the estates should stand charged with 2,000 *l.* for the sisters of the settlor, or their issue.

The lands vested in the trustees in fee, were sold to Robert Birch, under a decree for the payment of the incumbrances, which were accordingly paid out of the purchase money.

Robert Birch had notice of the settlement of 1747, in the year 1755.

Ann Kelly died in the life-time of Edmond, previous to the 2d May 1758, without having had issue.

Edmond, on the 2d of May 1758, on his marriage with Harriet Hincks, in consideration of a portion of 2,500 *l.* settled the estates to himself for life, remainder to trustees to preserve, remainder to the intent that the intended wife might receive a jointure rent-charge of 300 *l.* per annum, if there should be issue, and subject thereto, to the first and other sons of the marriage successively, in tail male; remainder to Edmond the settlor in fee.

15th July 1761, Edmond, for a valuable consideration, conveyed to Robert Birch the settled estates in fee. Part of the consideration the jury found to be the debts for which the estates under the decree had been sold.

The brothers of Edmond died in his life-time unmarried, and without issue.

The lessor of the plaintiff, was the grandson of Ignatius, the *uncle*.

Edmond, the settlor, died in 1768, without ever having had issue.

The lessor of the plaintiff claimed under her father, Robert Birch's will, and was entitled to a portion under a term of years, created by his marriage settlement, which was made in consideration of his intended wife's portion.

No. XXIV.

Sloane v. *Cadogan.*

Rolls, December 1808 (*i*).

Under a settlement made previously to the marriage of Earl Cadogan and Frances, his wife, the sum of 20,000 *l.* was assigned to trustees upon certain trusts, under which, William Bromley Cadogan, one of the children of the marriage, became entitled, subject to his father Lord Cadogan's life interest therein, to one-fourth share of the 20,000 *l.* which sum was afterwards invested in the 3 per cent. reduced annuities, in the trustees names. By an indenture, bearing date the 26th May 1788, William Bromley Cadogan assigned to William Rose, William Bulkley, Duncan Stewart, and Alexander Graham, their executors, administrators and assigns, all such part, share or proportion, as he the said William Bromley Cadogan was entitled to as aforesaid, expectant on the decease of the Earl, *his father*, of and in the said sum of 20,000 *l.* and all the interest which, after the decease of the Earl, should become due in respect of such share.—To hold the same immediately after the death of the said Earl, and subject to his life estate or interest therein, in the mean time, unto the said William Rose, William Bulkley, Duncan Stewart, and Alexander Graham, their executors, administrators and assigns. Upon trust, immediately after the decease of Lord Cadogan, by and out of the first monies which should be received by, or come to their hands, by virtue of the same indenture, to pay 1,000 *l.* to such person or persons, and for such uses, intents and purposes, as he the said William Bromley Cadogan should, by any writing or writings under his hand, direct or appoint; and, in default of such direction or appointment, then to pay the said sum of 1,000 *l.* unto the said William Bromley Cadogan, or his assigns, to and for his and

(*i*) *Vide supra*, p. 629.

their

their own use and benefit. And, upon trust, to place out or invest the residue or surplus of the said monies and premises, as soon as might be, after the same should be received by them the said trustees, in such stocks, funds, or securities as therein mentioned; and to stand possessed of all the said residue of the said trust monies which should remain after payment of the said sum of 1,000 *l.* and of the said stocks, funds or securities; upon trust to pay unto, or authorize the said William Bromley Cadogan and his assigns, to receive the interest, dividends, and annual produce, for his life; and after his decease, and, in case his wife, the plaintiff, should be then living, upon trust to pay unto, or authorize her and her assigns to receive the interest, dividends, and annual produce thereof for her life, for her and their own use and benefit, the same to be in lieu of dower; and immediately after the decease of the survivor of the said William Bromley Cadogan and plaintiff, upon trust, to pay, assign and transfer the said residuum, and the stocks, funds, or securities for the same, in such manner for the benefit of the issue of the marriage between them the said William Bromley Cadogan and plaintiff as therein mentioned; and 'for default of such issue,' upon trust, to pay, assign and transfer the same to such person or persons, and upon such trusts, for such uses, intents and purposes, and by, with, under and subject to such powers, provisoes, charges, conditions, and limitations over, as he the said William Bromley Cadogan, at any time or times during his life, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered, in the presence of, and attested by two or more credible witnesses, or by his last will and testament in writing, or any writing in the nature of, or purporting to be his last will and testament, to be by him signed and published, in the presence of, and attested by such and the like number of witnesses, should direct, limit or appoint; and in default of such direction or appointment, or in case of any such and the same should not be a complete disposition thereof, then upon trust, to pay, assign and transfer the said residue, and the stocks, funds or securities, for the same or so much thereof, whereto any such direction or appointment as aforesaid should not extend, to the said Earl Cadogan (his father) his executors, administrators and assigns, to and for his and their own use and benefit. And, in the same indenture, is contained a proviso empowering the said William Bromley Cadogan and his wife, the plaintiff, at any time during their joint lives, to revoke the said

said trusts, or any of them, and to appoint or limit new or other trusts in the manner therein mentioned. The 3 per cents. were sold, and the produce lent to the Earl in 1786, upon real security, by way of mortgage.

William Bromley Cadogan, on the 11th May 1789, made his will, which was signed and published by him in the presence of and attested by two credible witnesses, and thereby directed his executrix to sell a leasehold estate at Reading; "and as to the money arising from the sale thereof, I give the same to my executrix; and as to all the rest and residue of my estate and effects whatsoever, I give and bequeath the same to my dear wife Jane Cadogan." And he appointed her his sole executrix. And the said testator shortly afterwards made a codicil to his will, which was not attested, in the words following: Whereas, by marriage settlement, I have given to my dear wife Jane Cadogan for her life, the whole interest of the moiety of my mother's fortune which was settled upon me, as will appear by the settlement itself, reserving to myself 1,000 *l.* for my own private use. And whereas I borrowed at Midsummer 1789, of Mr. William May, of Bingfield Mill, the sum of 600 *l.* at 4 ½ per cent. interest, and gave as security for the same, the joint bond of myself, the Reverend Mr. Bulkley, and Mr. William Simmonds Higgs, of Pangbourn-lane, Reading; I hereby direct, that the above-mentioned 1,000 *l.* be appropriated to the discharge and payment of the said bond; and if it should be convenient to my dear and honoured father, the Right honourable Lord Cadogan, to pay the said sum of 600 *l.* to the aforesaid Mr. May, of Bingfield, and to take to himself the 4 ½ per cent. interest, and deduct the whole principal and interest out of the moiety of my mother's fortune, which comes to me and my heirs at his decease, I shall esteem it a great favour added to the many I have received from him before. And the testator afterwards made a codicil to his will, also not attested, in the words following: In November 1790, Lord Cadogan was so kind as to pay the above-mentioned 600 *l.* for me to Mr. May, of Bingfield, by the which fatherly act of goodness, added to many others of the same kind, I am freed from all debts and incumbrances whatever, excepting an annuity of 10 *l.* a year, which I am engaged to pay to Mrs. Warsand, Mrs. Cadogan's aunt, now living at Paradise-row, Chelsea, for her life; and also to pay the expenses of her funeral.

There was no child of the marriage between the testator and his

his wife. The testator did not, in his life-time, in any manner, execute his general power of appointment in the indenture of 26th May 1783, or his power of appointment of the said sum of 1,000 *l.* unless by his will; nor did he, together with the plaintiff, execute their joint power of revocation therein contained.

The plaintiff claimed to be entitled to one-fourth part of the 20,000 *l.* and the bill was filed against the executors of the Earl of Cadogan, to establish her right.

The defendants, in their answer, stated, that the Earl paid off the 600 *l.* and interest, mentioned in the codicils, and they submitted, that they became entitled to be repaid such sum, out of the 1,000 *l.*; and they claimed to be entitled to the whole of the fourth share of the said William Bromley Cadogan, subject to the plaintiff's right to the interest for her life (save and except the aforesaid 1,000 *l.* part thereof,) under the indenture of 26th of May 1783.

Mr. Richards, Mr. Stephen, Mr. Bowdler, and Mr. Sugden, for the plaintiff. The argument of the latter, which in a great measure was a repetition of the arguments before urged, is the only one of which he is enabled to give the reader a full note.

It was to the following effect:—

The first question is as to the 600*l.* The defendants might as well contend that they are entitled to an account of every sum advanced by the Earl to his son. In every case, between a father and child, a provision by the father is deemed an advancement for the child, on account of the connection of blood. If a father purchase in the name of a child, *primâ facie*, it is an advancement for the child, and the evidence to rebut this lies on the father; whereas, if a purchase be made in the name of a stranger, the presumption is otherwise, and the evidence to rebut it lies on the stranger. Besides, if the question here was between strangers, payment might be pleaded although twenty years have not yet elapsed. Lord Mansfield laid it down, that sixteen, eighteen or nineteen years were sufficient whereupon to found the presumption of payment (Mayor of Hull *v.* Horner, Cowp. 109; Oswald *v.* Leigh, 1 T. Rep. 270), and Lord Erskine so considered the rule (Hillary *v.* Waller, 12 Ves. 266.) And even if payment would not be presumed, yet a jury would, in this case, be directed to find a release. (Washington *v.* Brymer, App. to Peake's Evid.) —[This point was given up by the defendants.]

The

The principal question, however, is, whether the power is executed; and first, whether it is executed by the will alone? I must admit, that in general a sweeping disposition, however unlimited in terms, will not include property over which the testator has merely a power, unless an intention to execute the power can be inferred from the will. But great judges have disapproved of this rule. Lord Alvanley, in Langham *v.* Nenny, 3 Ves. jun. 467, wished that the rule had been otherwise, and that it had been held that a general disposition would operate as an execution of the power; and in Nannock *v.* Horton, 7 Ves. jun. 391, Lord Eldon said, that he was not sure that the rule, as now established, did not defeat the intention nine times out of ten. In favour of the rule it has been said, that to overturn it would be to destroy the distinction between power and property. That I deny. The marked and only material distinction between power and property is, that in the case of absolute property, although the party make no disposition of it, yet it will descend to his representatives; whereas a person must actually execute his power, or the fund will go over to the person to whom it is given in default of appointment. But why should not the same words operate as an execution of the power which would pass the absolute interest? Where is the distinction as to the purposes of disposition between a general power like this and the absolute interest? If the solemnities required by the power are adhered to, it would startle a man of common sense not versed in legal subtleties, to understand so refined a distinction. As therefore the rule stands upon no principle, and has been regretted by great judges, the Court will be anxious to distinguish cases, and not to consider every case as within this general rule. Now there is not a single case in the books which governs the present. Ours is a peculiarly strong case. The gift to the Earl in default of appointment, was without consideration, and the parties had a power of revocation. The persons who prepared the settlement did not understand the distinction between power and property. They gave the 1,000 *l.* to such persons as Mr. C. should appoint, and in default of appointment to him and his assigns. There the power was merely nugatory: it was not larger than the gift, nor different from it in effect. Besides, here the property moved from Mr. Cadogan; the settlement as to the Earl was merely voluntary, and the power was part of Mr. Cadogan's old dominion, and consequently the execution of it must receive a favourable

favourable interpretation. In this respect all the cases are distinguishable. Moulton *v.* Hutchinson, 1 Atk. 558; Andrews *v.* Emmott, 2 Bro. C. C. 297; Buckland *v.* Barton, 2 H. Blackstone, 136; Croft *v.* Slee, 4 Ves. jun. 60; Nancock *v.* Horton, 7 Ves. 391; and Bradley *v.* Westcott, 13 Ves. 445; are all cases where the power was given by one person to another, and cannot be compared to our case, where the power was reserved by the party over his own property. There are two cases, I must admit, where nearly the same circumstances did occur. *Ex parte* Caswall, 1 Atk. 599; Bennet *v.* Aburrow, 8 Ves. 609. But the first case came on merely upon a petition; and Lord Hardwicke said he would not say what his opinion would be if it came on upon bill and answer. Besides, Lord Hardwicke overruled this case by a later determination, as I shall presently show. In the last case the property in default of appointment was given to the next of kin, which may be thought to distinguish it from ours. But if there is no authority against the plaintiff, there are two very considerable cases in her favour. The first is Maddison *v.* Andrews, 1 Ves. 57. There a man made a settlement reserving to himself power to charge, limit, or appoint the estate with any sum not exceeding 1,000 *l.* By his will, without making the slightest reference to his power, he gave some legacies, and then charged all his estate with the payment of his debts and legacies. Lord Hardwicke held that the power was part of the old ownership; and that it was but a shadow of difference that he had charged all his estate; whereas this was before settled to uses, for these powers to the owner were to be considered as part of the property. Now this is precisely our case, and to decree against the plaintiff, your Honor must overrule Lord Hardwicke's decision. The other case is Standen *v.* Standen, which has been already so justly relied on. It is impossible to read that case without seeing that Lord Rosslyn would have decided it, on the ground of the power being equivalent to the ownership, even if the circumstance had not occurred to which the decision is generally referred—that the testatrix had no real estate except what was subject to the power. And yet in that case the power was a gift by a will from a husband to his wife, and was not, as in our case, a part of the donee's old dominion.

But if the will of itself is not an execution of the power, that and the codicil taken together certainly are. The operation of a codicil even in respect of real estate, is to republish the will, and pass after purchased estates, although not noticed, if executed according

according to the statute of frauds. Piggott v. Waller, 7 Ves. jun. 98. And where, as in our case, new matter is introduced, it forms an integral part of the will, in the same manner as if it had actually been inserted in the will at the time of its execution. And on this ground a codicil may explain a doubtful expression in the will, or may give an estate by *implication*, where the testator refers to what he supposes he has done by his will, although the disposition in the will is not what he states it to be. Hayes v. Foorde, 2 Blackst. 698; Beable v. Dodd, 1 T. Rep. 193. In our case the words in the will are sufficient, if an intention appeared to execute the power, and as such an intention does appear by the codicil which forms part of the will, they both together amount to an execution of the power. It is impossible to misunderstand the words in the codicil, "which comes to me and my heirs at his decease." They admit of but three constructions —1st, He considered the fund as having passed to his devisee, who was his *hæres factus:* or 2d, he adverted to its going to his *hæres natus*, or child under the settlement: or 3d, he looked to the event of its going to his father, the Earl, in default of appointment. The 2d cannot be the right construction; for if there was issue to take the fund, their right would prevail over the testator's, and the Earl could not retain his debt out of a fund which would in that event belong to them. The last construction is absurd: it would amount to a request, as has been already shown, to a man to pay himself a debt out of his own money.— But he considered the property as having passed to his wife; and as he knew that it was in the hands of his father, who had a life interest in it, he requested him to retain the money out of it, and not to let his wife be troubled for it till the property given to her fell into possession. This then clearly establishes the first construction. Our case must not be compared to Holmes v. Coghill, 7 Ves. 429, 12 Ves. 206; for there the power executed by the will was discharged before the execution of the codicil.

It will, however, I suppose, be objected, that the codicil is not attested, and consequently cannot be deemed an execution of the power. But it is sufficient where a power is executed by several instruments, that the principal one is duly executed. Earl of Leicester's case, 1 Ventr. 278. The will and codicil amount together to an execution of the power. But I need not insist upon this, because the plaintiff being a wife, is entitled to have the defect in the execution supplied; and it is not material that she is in part provided for, because the husband is the judge of the quantum

quantum of provision; nor is it material that the provision was made *after* marriage, although to constitute a good settlement of realty, as against a purchaser, a settlement after marriage is merely voluntary. Fothergill *v.* Fothergill, 2 Freem. 256; Hervey *v.* Hervey, 1 Atk. 561; Churchman *v.* Harvey, Ambl. 335.

But strong as these grounds are, they are not the only ones upon which the plaintiff's case may be rested. I mean to contend, that the supposed settlement of Mr. Cadogan was merely tantamount to articles, that the gift to the Earl was voluntary, and consequently cannot be enforced by this Court, and that it is immaterial that the funds are now actually vested in the executors of the Earl. I may admit, that if we asked the Court to execute the articles, they must be executed *in toto*. But we do not require the aid of the settlement to support our title; we are content to take this fund as part of Mr. Cadogan's property discharged from this settlement. To constitute an actual settlement, so as to enable a volunteer to claim the benefit of it, it is absolutely necessary, that the relation of trustee and *cestui que trust* should be established. Here Mr. C. did all he could; but that is not enough. He could not make an actual transfer. The trustees in whom it was vested, would not have been authorized in transferring it of their own authority to the trustees of Mr. C.'s settlement. *If a man is seised of the legal estate, and agree to make a voluntary settlement, it cannot be enforced. Can it make any difference that the legal estate happens to be outstanding?* Certainly not. As the settlement therefore was not completely perfected, the Earl could not enforce it. It will not be pretended, that there is any consideration as between a child and father, which will call for the interference of this Court. The father is as a mere stranger. It was so as to covenants to stand seised; and this Court does not even advert to every consideration which is sufficient to raise a use under a covenant to stand seised. In Stevens *v.* Trueman, 1 Ves. 73, where an agreement by a child, to settle an estate in the events which had happened on her father, was enforced, it was not even hinted, that there was any consideration as between the child and father; but the decision was grounded on the gift by the father of 500*l.* to the child. And in all the cases on this subject, it will be found that the decisions proceeded on the ground of some consideration given for the settlement on the strangers. Goring *v.* Nash, 3 Atk. 186, was the mere case of a settlement by a father on his younger daughter. Osgood *v.* Strode, 2 P. Wms. 245, was an actual

purchase

purchase by the grandfather of the limitations to his grandchildren. Vernon and Vernon, in the same book, 594, turned upon something like a moral consideration. Lord Chancellor King did not consider it a voluntary conveyance, 2 Kel. Cha. Ca. 10. Besides, there the Court relied upon the covenant which might be enforced at law; and, therefore, to prevent circuity, they enforced a performance *in specie*. But even that doctrine is now overruled, Hale's case, Ch. 1764; and in our case there is no covenant. The general doctrine in these cases is recognized in Colman *v.* Sarrel, 1 Ves. jun. 50; followed by Ellison *v.* Ellison, 6 Ves. jun. 656. In this case, it is not material that the fund is actually vested in the defendants; because it is vested in them in a different right.—This Court will never permit a mortgagor under a settlement to claim the fund in a different character. In Ellison *v.* Ellison, Lord Eldon considered, that when the relation of trustee and *cestui que trust* was actually raised, although the settlement was voluntary, it was not material that the fund had, by the effect of accident, got back to the settlor, as if the trustee of stock should make the settlor his executor. Now, the converse of this proposition must equally hold good, and that is our case.—It is like a late case before your Honor, where a legacy was given to a married woman by a will, and the husband was made executor, and received the legacy; and your Honor held, that he had not reduced it into possession, so as to prevent his wife's right by survivorship. And why? Because he had received it as executor, and not in his marital right. The characters were totally distinct. That decision must govern our case.

Sir Samuel Romilly and Mr. Raithby for the defendants:—

To hold the will to be an execution of the power would be to overrule all the cases on residuary bequests. The case of Madison *v.* Andrew decides nothing more than that where a man has a general power of appointment, the fund shall be subject to his debts, which has long been the law of this Court. [Master of the Rolls.—But there, as in this case, the estate was settled subject to the power.] At any rate that case is not now an authority. As to the codicil, it is said, that the defect may be supplied; and so it may in common cases, but here it cannot be looked at, as it is not attested; because, here no intention appears to execute the power on the face of the instrument. A clear intention must appear, before the Court can aid the defect. The codicil is against the plaintiff. It shows that he forgot there

was

was any power. He thought, in default of issue, the property would revert to him. And, if he forgot his power, the Court cannot hold that this will pass under a bequest of property. The plaintiff admits that the will of itself would not be an execution of the power, and the codicil amounts to nothing; for this is the case of a non-execution, and not of a defective execution. As to the point upon the settlement being voluntary, if it be correct, it cannot be acted upon in this case, because the plaintiff states the settlement, and grounds her title upon it. The question is not made by the bill, and cannot now be gone into, even admitting that the law is as stated; whereas, here the fund is actually assigned, and the defendants do not require the assistance of the Court to defend their title.

Mr. Richards in reply.

The limitation to the Earl of Cadogan was merely voluntary; it was a mark of respect to him; but, in point of law, he was a mere stranger. He could not have required a subpœna against our trustees. And, in fact, the defendants are asking relief, as they want to retain the fund, although they are bound to reassign it in their character of mortgagors. [Master of the Rolls. Lord Cadogan could not have come here, requiring Mr. Cadogan to give him a better security for the money. But here did Lord C. stand in need of any other aid? The assignment was as good an assignment as could be made of this reversionary interest. You may be a trustee for a volunteer.] Upon the will and codicil taken together, there can be no doubt but that this power was duly executed. The words in the codicil admit of no other meaning than that the property was given to his wife by his will.

Master of the Rolls, having taken time to consider:—

Two points were made on the part of the plaintiff; 1st, that it was not necessary that the husband should execute the power. But, 2dly, if it was, that his will did amount to an execution of it. As to the first, it was said that the gift to Lord Cadogan was merely voluntary, and Lord C. could not have had any assistance from this Court: that the question is the same as if the representatives were parties seeking relief, as the circumstance of his executors having the money makes no difference, and I think that that circumstance is immaterial. But, as against the party himself, and his representatives, a voluntary settlement is binding. The Court will not interfere to give perfection to the instrument, but you may constitute one a trustee for a volunteer. Here the fund was vested in trustees: Mr. W. Cadogan had an

equitable reversionary interest in that fund, and he has assigned it to certain trustees, and then the first trustees are trustees for his assigns, and they may come here, for when the trust is created no consideration is essential, and the Court will execute it though voluntary.

Then the question is as to the power. The will, it was hardly contended, although attested, would amount to an execution of the power. The circumstance of the attestation has been held not to be material, and it is now settled that a general disposition will not include property over which the party has only a power, unless an intention appear. But it is said, here is a codicil which will amount to an execution. For this no authority was cited; and I am not aware that the conception of the testator, of his power over his property, is ever referred to, except for the purpose of election. But here the question is upon an execution of a power. This point, however, is immaterial, as the codicil does not establish the testator's intention; he uses expressions descriptive only of the interests which his mother's settlement gave him in the fund, but that does not show that he meant to exercise the power. It is quite evident that he had not forgot his power. Here he remembered the settlement, and states that he had an absolute power over the 1,000 *l.* The request is not evidence that he might not consider that Lord C. would not, in some event, become entitled to the property. But here he meant only that the money should be deducted out of the 1,000 *l.* The codicil does not show that he considered all the property was *his*, which is necessary; and I should conclude the contrary. The bill must be dismissed as to this fund.

No. XXV.

Bury v *Bury* (*k*), *Ch.* 11*th July* 1748.

Sir Thomas Bury being seised of a freehold estate, and also possessed of a leasehold estate, on the marriage of his son, Thomas Bury, by lease and release, 3d and 4th January 1725, settled the freehold estate on himself for life; remainder to his wife for life; remainder to Thomas, his son, for life; remainder to his intended wife for life; remainder to his first and other sons in tail male, with remainder to plaintiff for life, with remainder to his first and other sons in tail male;

(*k*) *Vide supra*, p. 713. 726.

with

with remainder over: and the leasehold premises were assigned to trustees, to raise money to renew the lease, then to pay the rents to Thomas, the son, for his life; remainder to his intended wife for her life; remainder to his first and other sons; remainder to the trustees, to pay the rents to plaintiff for his life; remainder to his first and other sons, with remainder over.

The marriage took effect; the wife died without leaving any issue male. Sir Thomas died.

Thomas Bury, on his second marriage with the defendant, having renewed the lease, by indenture, dated 31st Dec. 1736, settled the leasehold premises to himself for life, remainder to his second wife, the defendant, for life, with remainders over; and therein taking notice, that the said *Thomas Bury was seised for the term of his natural life with a power of jointuring* in the said freehold lands, did, for enlarging the jointure, grant the same to her, for life, with remainders over.

The marriage took effect; Thomas Bury died without leaving any issue male, either by his first or second wife; so that the plaintiff became entitled to the leasehold premises, by virtue of the settlement made on Thomas Bury's first marriage. The bill was brought against the second wife for an account of the rents and profits of the leasehold premises, and to have all deeds and writings relating thereto delivered up.

The defendant denied that she had any notice of the deeds, 3d and 4th Jan. 1725, or that there was any settlement of the leasehold premises, or that any such deed was delivered to her with the rest of the writings. There was only one witness who had proved he had been employed to look over the title for Thomas Bury and defendant; and that amongst the papers he had seen a foul draft of the former settlement, and that there was no power of jointuring in the leasehold premises, which he told Thomas Bury of.

Lord Chancellor.—There are two questions: 1st, Whether she had notice? 2dly, if no notice, Whether she can protect herself under the lease renewed by her husband?

As to the 1st, there is no positive evidence of notice: she denied it by her answer, and there being only one witness against that answer, a decree cannot be made upon that one witness's testimony. Where an agent has been employed for a person in part, and not throughout, yet that affects the person with notice: here the recital in the deed of the power of jointuring was sufficient to have made defendant have inquired into it, and therefore

shall affect her. In Le Neve *v.* Le Neve she admitted Norton was her agent; and so that differs from this case.

As to the 2d, There was no surrender of the former lease, for the legal estate was in trustees, and therefore the Court is to judge only as between *cestui que trusts*; and though the lease was renewed by T. Bury, yet it must follow the trust of the whole term, and he can have no contribution for what he paid, for he enjoyed it during his life. If a lease or deed is wrongfully given up or destroyed, you may give evidence of the purport of the deed, or have a discovery from the grantors.—Decreed, that no alteration was made in the former trusts by Thomas's renewal of the lease.

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THE END.

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